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THE RIGHT OF EMINENT DOMAIN.*

CHAPTER I.

GENERAL OUTLINE.

§ 1. DEFINITION. The end of all government being to promote the welfare of the subject, it is essential to the prosperity of a State that the government be endowed with the requisite powers to attain the objects of its institution. The chief of these are, to provide for the common defence, to protect and secure the rights of the governed, and to further in every way the general interest.

Such being the duties of the government, it naturally follows that the exigencies of the State are of paramount importance, and must take precedence of those of individuals. And hence, although as a general rule every one is entitled to the undisturbed possession of his property, limited only in its acquisition, enjoyment, and transmission, as all agree, by the regulation of the law, yet he holds it subject to be applied to the uses of the public whenever a necessity may arise for such taking.[1]

The State alone can decide when such a necessity exists, and it must have the power to exercise this right without the consent of

* This Essay has recently obtained the first prize of a gold medal from the Law Department of the University of Albany, N. Y. The Committee to award the prizes consisted of Hon. Isaac Toucey of Connecticut, Hon. Isaac F. Redfield of Vermont, and Hon. J. S. Bosworth of New York. It was written by Henry C. Marvin, a graduate of the last class of the Albany Law School, now of New York city.

[1] Grot. de Jure Pub. Lib. 1, ch. 1, § 6; Vattel, Lib. 1, ch. 20, § 244.

the owner of the property. Were this not so, a single individual would be able to defeat the purposes of the government by refusing to surrender his property or by demanding an unreasonable compensation therefor.

This pre-eminent right of the State is called "THE RIGHT OF EMINENT DOMAIN:" and we may define the right to be "*the power to take private property for public use.*"

§ 2. ORIGIN. Writers on this subject have held different opinions respecting the origin of this right, the theory of each taking its rise from those forms of government with which he was most familiar. Thus many strongly urge that it is a right inherent in sovereignty itself;[1] while others contend with equal warmth, that it is imparted to the government by the assent, express or implied, of its subjects.

As the supreme power in all the States composing our federal Union, derives its authority from written constitutions emanating directly from the people, American jurists have almost universally adopted the latter theory as more in accordance with the spirit of our institutions. There is a manifest inconsistency in the former, unless we are considering a pure despotism. For even the writers who maintain this view admit that justice requires compensation to be made for the property so taken. If the right to take it be inherent in the sovereign, why need there be any compensation? And, as if aware of the fallacy of the doctrine of inherent powers in the sovereign, some are disposed to limit them to such as are of absolute necessity, admitting that all beyond arise from the act or assent of the people.[2]

The more rational view would seem to be that it is a power imparted to the government by the assent of the people at its formation, and that it arises from the very necessity of the case.[3] "For," says Vattel, "the State could not subsist or constantly administer the public affairs in the most advantageous manner, if it had not a power to dispose occasionally of all kinds of property subject to its authority."[4]

§ 3. NATURE. We have seen that this right gives the government, in certain cases, a control of private property. But it is not the only one that does so. There are other powers vested in the government to ensure the welfare of its subjects; and many of these also relate to property. We must be careful then, lest in the outset we confound the peculiar right under consideration with

[1] Grot. Lib. 1, ch. 1, § 6.

[2] Puff. de Jure Nat. Lib. 7, ch. 3; Id. Lib. 8, ch. 5, §§ 1, 2, 3, 7.

[3] Bynker. Lib. 2, ch. 15; Raleigh and Gaston R. R. Co. *v.* Davis, 2 Dev. & Bat. 456; Harding *v.* Goodlett, 3 Yerg. 53; Gardiner *v.* Newburgh, 2 John. Ch. 162; Van Horne's Lessee *v.* Dorrance, 2 Dallas, 310; Dyer *v.* Tuscaloosa Bridge Co. 2 Porter, 303.

[4] Lib. 1, ch. 20, § 244.

other powers of the State, which at the first glance seem to be similar in their nature, but on examination appear widely different.

Thus we have nothing to do with the statutes by which the government regulates the *use* of property: as for instance, those restraining owners of lands in towns from erecting wooden buildings within certain limits; those regulating the erection and use of steam engines and furnaces; and those interdicting unwholesome trades, slaughter-houses, the deposit of gunpowder, and the burial of the dead. All these relate to the *use* of property, and are quite distinct from the *taking* of property under the right in question. They all spring from the general principle of the law. "*Sic utere tuo ut alienum non lædas.*"[1]

We must also exclude the power of taxation which is sometimes confounded with this right, but is a distinct attribute of sovereignty. Taxes are levied in such a way as to become an equal burden upon all, and are no more than every one's just contribution to the general good; whereas the exercise of the Right of Eminent Domain takes from a single individual an amount of property far beyond his equal share of the burden. He alone is the loser, while all his fellows are benefited. This distinction will fall more properly under the head of Compensation, but it serves here aptly to illustrate the distinction between the Right of Eminent Domain and the laws regulating the use of property. It was for some time doubted, whether the acts of many of the State legislatures allowing the destruction of buildings to prevent the spread of fire were not exercises of this right. These statutes have sometimes afforded the owner of such buildings an indemnity; but the general opinion seems to be, that such destruction is not a taking of private property for public use, but is a right existing at common law, of which the statute is a mere re-enactment, and is founded on necessity.[2]

Finally, it is distinct from the *Domain* of the State over the property which belongs to it absolutely. Over these public lands the government has *absolute* authority, and can appropriate them for any purpose calculated to promote the general good without at all intruding upon individual rights.

Thus while we must beware and not regard this Right of Eminent Domain as any inherent right of the State in the property of its subjects, we must not confound it with the domain of the government over the public lands of the State.

The Right of Eminent Domain, then, is a power existing in the supreme authority of a State to take private property for the public use whenever a necessity shall arise for so doing, and attached to this right and inseparable therefrom is the duty of paying an ade-

[1] 2 Kent's Com 340; People *v.* Tewkesbury, 11 Met. 55.

[2] 15 Viner's Abr. tit. Necessity, n. 8; Mouse's Case, 12 Coke, 63; 2 Kent, Com. 338; Russell *v.* Mayor of N. York, 2 Denio, 461; Taylor *v.* Plymouth, 8 Met. 462; Sarocco *v.* Geary, 3 Cal. 69.

quate compensation therefor to the owners of the property so taken.[1]

§ 4. Constitutional Provisions. The existence of this right and the duty of making compensation for the property taken by virtue of it, have been recognized since the earliest times. It was well known to the Romans, as is shown by the case of M. Licinius Crassus, cited by Bynkershoek,[2] where a scheme of the Censors (B. C. 179) to supply the city with water was defeated by the refusal of Crassus to let it be carried through his land. And the senate afterwards provided for the repair of the aqueduct by allowing the necessary materials to be taken from adjacent lands by paying a fair price to the owner.[3]

In England although their theory of government would rather tend to claim this as an inherent attribute of sovereignty, yet the spirit of equity and justice that has always animated her legislators and statesmen, has led her to award in all cases full compensation for the property so taken. Thus as early as 1544, we find Parliament authorizing the Corporation of the City of London to supply the city of London with water, and to take private property for their works on payment of a compensation.[4]

In this country the Constitution of the United States expressly declares that "private property shall not be taken without due compensation," (Am. to Constitution, Art. 5); but this provision is held to limit only the powers of the general government, and not to apply to the internal regulations of the States.[5]

The general government, however, can undoubtedly exercise this Right of Eminent Domain when it may be necessary for its purposes; but as regards the public works of a State, the discretion and power is entirely vested in the State government.

In cases of new States formed out of territory belonging to the United States, the Right of Eminent Domain necessarily passes to the State at its formation; and nothing remains in the United States but the public lands.[6]

[1] Grot. de Jure Bel. Lib. 3, ch. 19, § 7; Puff. de Jure Nat. Lib. 8, ch. 5, § 3, 7; Bynk. Quæst. J. P. Lib. 2, ch. 15; Vat. Lib. 1, ch. 20, § 244; Hooker *v.* Canal Co. 14 Conn. 146; Hamilton *v.* Annapolis and Elk Ridge R. R. Co. 1 Maryland Ch. 107; Thatcher *v.* Dartmouth Bridge Co. 18 Pick. 501; Bloodgood *v.* Mohawk and Hudson R. R. Co. 18 Wend. 9; West River Bridge Co. *v.* Dix, 6 How. 507.

[2] 2 J. P. Lib. 2, ch. 15.

[3] Tacitus, Annals, § 75.

[4] 1 Bl. Com. 139; Stat. 13 Geo. III. ch. 78; 3 Geo. IV. ch. 126, §§ 84, 85; 1 and 2 Wm. IV. ch. 43; 5 and 6 Wm. IV. ch. 50, §§ 54, 82; 8 Vict. ch. 18, § 16 *et seq.*; 8 Vict. ch. 19 *et seq.*

[5] Barron *v.* Mayor of Baltimore, 7 Peters, 243; Holmes *v.* Jennison, 14 Pet. 540; Fox *v.* Ohio, 5 How. 510; E. Hartford *v.* E. Hartford Bridge Co. 10 How. 511.

[6] Pollard's Lessee *v.* Hagan, 3 How. 212; Goodtitle *v.* Kibbe, 9 How. 471; Doe *v.* Beebe, 13 How. 25.

The majority of the States have a like provision in their Constitutions requiring compensation to be made in all cases of the exercise of the right, and only differing in the mode of computing its amount and the time of payment.[1]

Those States that have no such provision in their Constitutions still recognize the right and the duty of compensation as springing from the laws of necessity and justice.[2]

§ 5. ANALYSIS. This right is composed of three elements, each of which we propose to consider in their turn.

1. It must be *private property* that is taken.
2. It must be taken for a *public use.*
3. There must be a compensation therefor.

CHAPTER II.

OF PRIVATE PROPERTY.

§ 6. DEFINITION. The term "*private property,*" as applied to the right of Eminent Domain means, property that does not belong to the State, corporate body or municipality, which proposes to take it for the public use.

§ 7. WHAT MAY BE TAKEN. No species of property, real or personal, can be said to be exempt from the exercise of this right; though in practice the kinds of property most usually taken are real estate and the interests connected therewith, and personal property of a physical or material character. Yet the only limitation seems to be in the needs of the State, and it is quite possible to imagine an emergency that would call for the taking of all kinds of private property. The State probably would never be necessitated to take *choses in action,* or any *negotiable paper;* for the credit of the government is always better than that of its subjects, and could always be rendered available in such exigencies. But of the general principle there can be no doubt.

The federal government having charge of the welfare of the whole nation would, undoubtedly, in cases of national necessity, have the same power to take the public lands of the several States and lands and property already appropriated by them to their

[1] Constitution of Ala. Art. 1, § 13; Cal. Art. 1, § 8; Conn. Art. 1, § 11; Dela. Art. 1, § 8; Florida, Art. 1, § 14; Ill. Art. 8, § 11; Ia. Art. 1, § 18; Ky. Art. 13, § 14; La. Art. 109; Me. Art. 1, § 21; Mass. Part 1, Art. 10; Mich. Art. 18, §§ 14, 18; Miss. Art. 1, § 13; Mo. Art. 13, § 7; N. Hamp. Part 1, §§ 12, 14; N. J. Art. 2, § 16; N. Y. Art. 1, § 6; Ohio, Art. 1, § 19; Penn. Art. 9, § 10; R. I. Art. 1, § 16; Tenn. Art. 1, § 21; Texas, Art. 1, § 14; Vt. Art. 1, § 2; Va Art. , § 11; Wis. Art. 1, § 13.

[2] Ex parte Martin, 13 Ark. 198; State *v.* Dawson, 3 Hill, (S. C.) 100; R. R. Co. *v.* Davis, 2 Dev. & Bat. (N. C.) 451; Young *v.* M'Kenzie, 3 Kelly, (Ga.) 31; The Bellona Co.'s Case, 3 Bland's Ch. (Md.) 442.

public works, as they would have to take the property of any individual citizen of the United States. When property has thus been taken, the State government cannot appropriate it to any other purpose, for in all matters concerning the well being of the nation collectively, the authority of the federal government must be supreme and override that of the individual members of the confederation.

The State governments can take the property of all individuals, copartners, towns, counties, villages and cities within their jurisdiction. They can also take all lands within the State which the United States hold merely as proprietor, and which are unappropriated to any national use, and lands belonging to another State or to the Indians.[1]

There can be little doubt but that the State may also take the property of aliens within its jurisdiction; there being no good reason why they should be exempted from a duty imposed upon our own citizens, while sharing equally with them the protection of our laws. Indeed as regards real estate there can be no doubt at all, for they can only hold it by the favor of the State, and if the State by *office found* can take the whole, they certainly can take any part of it for the public use, if it be needed therefor.[2]

Nor are corporations exempt from the exercise of this right. A franchise is an incorporeal hereditament, and as such is property.[3] The State may take the franchise of a corporation and its property, and devote them to another and a different use, as if they belonged to an individual, rendering compensation in the same way. Though this has been much questioned, yet it is now well settled that this is not "*impairing the obligation of contracts*," but that the State is presumed never to part with its attributes of sovereignty, and that corporations and individuals take their franchises subject to right of the State to make any future provisions in relation thereto.[4]

§ 8. WHAT IS A TAKING. The word "*take*" and its derivatives, in reference to the Right of Eminent Domain, have universally been interpreted to mean *a taking altogether, a seizure, a direct appropriation, a dispossession of the owner*.[5] We have already seen that regulations relative to the use of and taxes on property,

[1] Graham's Lessee *v.* M'Intosh, 8 Wheat. 595; Wadsworth *v.* Buffalo Hydraulic Ass. 15 Barb. 94.

[2] 2 Kent's Comm. 61.

[3] 2 Bl. Comm. 37.

[4] Charles River Bridge *v.* Warren Bridge, 11 Pet. 420; West River Bridge Co. *v.* Dix, 6 How. 507; Barber *v.* Andover, 8 N. Hamp. 398; Susquehanna Canal Co. *v.* Wright, 9 Watts & Serg. 9; Bellona Co.'s Case, 3 Bland. 442; Jas. Riv. & Kan. Co. *v.* Thompson, 3 Gratt. 270; White River Turnpike Co. *v.* Vermont Central R. R. Co. 21 Vt. 590; Ill. and Mich. Canal Co. *v.* Chicago and R. I. R. R. Co. 14 Ill. 314; Matter of Hamilton Av. 14 Barb. 405.

[5] Sharpless *v.* Mayor of Philadelphia, 21 Penn. 166; Livermore *v.* Town of Jamaica, 23 Vt. 361.

and the necessary destruction of property for the public safety are not embraced within this right. But some few cases will arise not comprehended within their limits that would seem to be "*a taking*" of "*private property*," but yet are not so; and these will demand a brief consideration.

Mere consequential damage to property by the public works of the State, by which its value is depreciated or lessened, is now generally held not to be such a taking. Thus if improvements in the navigation of a river affect the interests of the riparian proprietors, they are not entitled to compensation.[1]

But the legislature cannot, by declaring a river to be navigable that is not so in fact, deprive the riparian proprietors of their rights to the use of the water for hydraulic and other purposes without compensation.[2]

And in general the test will be whether the property is rendered entirely useless to the owner, or merely depreciated in value; if the former, it is a taking, if the latter, not.[3] The locating and use of a railroad track in a street already subject to the public easement is not a taking of property, but only an injury to it.[4]

Entries upon lands by the public officers of the State, or persons delegated to make surveys for public purposes, or in contemplation of the construction of public works, are not a taking of private property for public use.[5]

The establishment by the legislature of any public work so near another previously authorized by them as to impair and lessen its value, does not entitle the latter to compensation, as it is not a taking within the meaning of the term.[6]

Where a party enters into a contract with a State to furnish certain articles at a definite price, he cannot afterwards claim that they are worth more than the stipulated price, and that this is a taking of private property for public use without compensation.[7]

Excluding then all the above-mentioned cases, we come to our original definition. We find that a taking must be an absolute appropriation of the property for the use contemplated, and that this is the true test in relation to all questions arising under this branch of the Right of Eminent Domain.

[1] Lansing *v.* Smith, 4 Wend. 9; Canal Appraisers *v.* The People, 17 Wend. 571; *In re* Water Commissioners, 3 Ed. Ch. 290.

[2] Walker *v.* Board of Public Works, 16 Ohio, 540; Morgan *v.* King, 18 Barb. 299.

[3] Hooker *v.* Canal Co. 14 Conn. 146.

[4] Drake *v.* Hudson River R. R. Co. 7 Barb. 508; Plant *v.* L. I. R. R. Co. 10 Barb. 26; Philadelphia and Trenton R. R. Co. 6 Whart. 25.

[5] Polly *v.* Saratoga and Wash. R. R. Co. 9 Barb. 449; Winston *v.* Gifford, 6 Cush. 327; Cushman *v.* Smith, 34 Maine, 247; Matter of City of Pittsburg, 2 Watts & Serg. 320.

[6] Mills *v.* County of St. Clair, 2 Gilman, 197; White River Turnpike Co. *v.* Vermont Central R. R Co. 21 Vt. 590; Charles River Bridge Co. *v.* Warren Bridge Co. 11 Pet. 420.

[7] Sholes *v.* The State, 2 Chandler, (Wis.) 182.

CHAPTER III.

OF THE EXERCISE OF THE RIGHT AND HEREIN OF A PUBLIC USE.

§ 9. GENERAL DIVISIONS. We come now to the examination of the exercise of the Right of Eminent Domain. We shall consider briefly, *when*, *by whom*, and *how* it may be exercised, and the *effects of the exercise* upon the property taken. The consideration of a *public use* will appropriately fall under the first of these subdivisions.

§ 10. WHEN IT MAY BE EXERCISED. Private property, we have seen, can only be taken, without the owner's consent, for the public use. What is a public use?

The general welfare of the citizens of a State being the ultimate end and purpose of the exercise of this right, we may lay it down as a general principle that whenever property is taken for any object concerning the safety, interest, and even expediency of the State, it is taken for a public use.

The seizure of such property as might be requisite for the public defence, or the needs of the government in time of war, would be justifiable in the federal government. The States, however, not having the power individually to engage in war, probably would not have this right, unless actually invaded, or in such imminent danger as will not admit of delay.[1]

But occasions by far the most numerous for the exercise of this power by the government arise in time of peace, and are connected with the internal improvements of the country. Thus the making of public highways, turnpikes, and canals, the erecting and constructing wharves and basins, the establishing of ferries, the draining of swamps and marshes, and the bringing of water to cities, towns and villages, and many other improvements beneficial in their nature, all come under the designation of public works, and have for their object the general good.[2]

It is now well settled, though for some time disputed, that railroads, though owned by private corporations, are public works, and that the land taken for their construction is taken for the public use.[3]

[1] Const. U. S. Art. 1, § 10, 2.

[2] Beekman *v.* S. and S. R R. Co. 3 Paige, 73; Harding *v.* Goodlett, 3 Yerg. 41; Newburyport Turnp. Co. *v.* Eastern R. Co. 23 Pick. 327; Boston Mill Dam *v.* Newman, 12 Pick. 467; Heyward *v.* The Mayor of N. York, 3 Selden, 214.

[3] Beekman *v.* S. and S. R. R. Co. 3 Paige, 60; Varick *v.* Smith, 5 Paige, 137; Newburyport Turnp. Co. *v.* Eastern R. Co. 23 Pick. 327; Bradley *v.* N. H. R. R. Co. 21 Conn. 294; Swan *v.* Williams, 2 Mich. 427.

We cannot specify in detail all the objects that would require and sanction the exercise of this right. Property may be taken for any object calculated to benefit the State, a city, or a county, a town or a village; and there seems to be no definite rule as to the extent of territory that must be benefited in order to warrant such a taking. For the good of the State consisting in the welfare of its component parts, whatever tends to promote their prosperity, benefits indirectly the State itself.[1]

The State probably would not be justified in taking private property when it could procure elsewhere that which would answer its purposes as well. To sanction such a taking it would seem that the object must absolutely require the property in question. The object too must be useful and necessary, not merely ornamental.[2]

It has been held, too, that a legislative act is necessary to authorize such a taking, and that without this a seizure of property by an officer of the government which he could procure in no other way, for the public use, was an actionable trespass upon the owner of the property.[3]

A question has often arisen whether the State can authorize an individual to take the property of his neighbor for his own benefit and advantage, in other words, to take private property for private use without the owner's consent. It has been mooted most frequently in regard to the construction of private roads. In New York it is allowed by the Constitution,[4] so that in that State there can be no doubt of the constitutionality of such an act. But in States where no such provision exists it is very questionable. It seems to be wholly repugnant to the great principle of the law, that private property shall be sacred, except in case of public necessity. Chancellor Kent uses very strong language, and terms it "an abuse of the Right of Eminent Domain, and contrary to fundamental and constitutional doctrine in the English and American law."[5]

The courts have held similarly, and declared such a taking to be in violation of the cardinal principles of the Right of Eminent Domain, and when not authorized by constitutional provisions, void.[6]

The courts of Maryland, however, have upheld a law authorizing the laying out of private roads.[7]

§ 11. By whom it may be exercised. It belongs exclusively

[1] Hartwell *v.* Armstrong, 19 Barb. 166.
[2] 12 Pick. 480.
[3] Barron *v.* Page, 5 Heyward, 97; Parham *v.* Justices, &c., 9 Geo. 341.
[4] Const. 1846, Art. 1, § 7.
[5] 2 Kent's Comm. 340, note.
[6] Embury *v.* Conner, 3 Comst. 511; Scudder *v.* Trenton and Del. Falls Co. Saxton's Ch. 694; Teneyck *v.* Del. and Rar. Canal Co. 3 Harrison, 200.
[7] Hickman's Case, 4 Harrington, 580.

to the legislature to determine whether the benefit to be conferred by any public work is sufficient to warrant the taking of private property for public use. This is well settled, and from their *fiat* there can be no appeal. To their discretion alone the question is referred, and the courts have no voice in the matter.[1]

As it would be impossible for the legislature to superintend in person the execution of the public works of a large State, they also can delegate to individuals and corporate bodies, public or private, the right to take property for the construction of their respective works, subject to such regulations and restrictions as it may see fit to impose upon them, and in conformity with the general principles of the law which govern the exercise of this right.

Thus the legislature can authorize a private corporation to take lands for the construction of turnpike roads, railroads and canals, and for any object calculated to promote the general welfare. And this is the test. Whether the improvement is effected directly by the agents of the State, or through the medium of corporate bodies, or of individual enterprise, the effect is precisely the same as regards the interests of the State.[2] But the property must be taken by the order of and under the express directions of the corporate body or its lawful agents. It would seem that a mere workman cannot take materials without express orders from the company, or its agents or engineers. And such an order is a good defence to justify an entry upon land to procure the necessary materials for the work.[3]

The grant of this authority to a corporation must appear either expressly or by necessary implication from the act of incorporation.[4]

§ 12. How it must be exercised. As Congress and the legislatures of the various States derive their powers from written Constitutions, they are necessarily bound in the exercise of those powers not to violate any of the provisions of the instrument by which they are granted.

It has often been urged that the exercise of the Right of Eminent Domain by the State legislatures conflicts with that clause of the Constitution of the United States which declares "that no State shall pass any law impairing the obligation of contracts."[5] But

[1] Beekman *v.* S. and S. R. R. Co 3 Paige, 45; Varick *v.* Smith, 5 Paige, 137; Harris *v.* Thompson, 9 Barb. 350; Parham *v.* Justices, &c., 4 Geo. 341; Spring *v* Russell, 7 Greenleaf, 273; McMasters *v.* Commonwealth, 3 Watts, 395; Dunn *v.* City Council of Charleston, Harper, 189.

[2] Beekman *v.* S. and S. R R. Co. 3 Paige, 45; Bloodgood *v* M. and H. R. R Co 18 Wend. 14; Swan *v.* Williams, 2 Mich. 427; Scudder *v.* Trenton and Del Falls Co. Saxton, 694; Davis *v.* Tuscaloosa and Ala. R. R. Co. 4 Stew. & Por. 421; White Riv. Turnp. Co. *v.* Vermont Central R. R. Co. 21 Vt. 590; Young *v.* Harrison, 6 Geo. 130.

[3] Lyon *v.* Jerome, 26 Wend. 485; Bliss *v.* Hosmer, 15 Ohio, 44.

[4] Thatcher *v.* Dartmouth Bridge Co. 18 Pick. 501.

[5] Const. U. States, § 10, 1.

the courts have held that all contracts are subject to the Eminent Domain of the States, and the exercise of this power is not a violation of the clause in question.[1]

No more property must be taken than is requisite for the proper construction of the contemplated improvement, for the taking of anything beyond this will be unconstitutional and void. All acts of the legislature authorizing the taking of private property for public use will be construed strictly, and it must be taken solely for the public use, and no private enterprise can be added or joined thereto.[2]

The owners of property unlawfully taken may, however, waive their constitutional rights by consent.[3]

§ 13. Effects of the Exercise. Under this title we propose to consider briefly the effects of the exercise of the Right of Eminent Domain upon the property so taken.

As regards personal property where the use destroys it, there is no question as to the title of the property. It is paid for at a fair valuation, and becomes the absolute property of the body taking it. But in regard to real estate, a question often arises as to where the title to the property is, whether in the original owner, or in the party taking, and more especially whether, when the public use is discontinued, there is any reversion to the original proprietor. It has been strongly contended and urged, that the legislature can take no greater estate than is absolutely necessary for their purposes.[4] But a difficulty here presents itself. Who is to judge of the kind of estate that will be needed? And why should not the legislature, which is the judge of the expediency and necessity of taking, be also the judge of the amount of interest to be acquired? For of course the compensation must be in a proportionate ratio to the estate taken. It would seem that this power must of necessity vest in the legislature, in order to exercise and enjoyment of their Right of Eminent Domain.[5]

Taking this view, we see that would depend entirely upon the nature of the estate taken, as to whether there would be any reversionary interest in the original owner.

It has been held, that the title vests absolutely in the body taking the property, on condemnation of the land and payment of compensation.[6]

[1] Richmond R. R. Co. *v.* Louisiana R R. Co. 13 How. 83; West River Bridge Co. *v.* Dix, 6 How. 507; Rundle *v.* Del. and Rar. Canal Co. 14 How. 80.

[2] Dunn *v.* City Council of Charleston, Harper, 189; Harding *v* Goodlett, 3 Yerg. 53; Matter of Albany St., 11 Wend. 149; Embury *v.* Conner, 3 Coms. 516.

[3] Baker *v.* Braman, 6 Hill, 47; Embury *v.* Conner, 3 Coms 516.

[4] People *v.* White, 11 Barb. 26.

[5] Heyward *v* The Mayor, 3 Seld. 325.

[6] Attorney General *v.* Turpin, 3 Hen. & Mun. 348.

CHAPTER IV.

OF COMPENSATION.

§ 14. General Principle. In considering the nature of the Right of Eminent Domain, we found that there was a duty appurtenant to the exercise of the right, that of making compensation for the property so taken.[1] We found this laid down by all writers on natural law, sustained by judicial decisions, and almost universally embodied in the Constitutions of the various States of the Union.[2] Let us look then and see why this is so.

It is the duty of every citizen to contribute his proportionate share to the defrayment of any public burden, and this is imposed by the payment of the taxes levied by the government. But private property taken for public use by the Right of Eminent Domain is taken not as the owner's share of a public burden, but as so much beyond his share, and the loss falls on him alone. Special compensation must therefore be made in the latter case, because the government is a debtor for the property so taken.[3]

This is the reason why compensation is a duty, and we also see the distinction between taxation and eminent domain. By keeping these principles in view we shall avoid confounding two distinct attributes of government, which though sometimes seemingly alike, are in reality totally different and distinct.

§ 15. Who are entitled to Compensation. Every one whose property is taken for or materially damaged by any public improvement, is entitled to a compensation. This is the general rule, but there are some exceptions. Thus a person is not entitled to compensation for mere consequential damage.[4]

Where individuals have dedicated land to the public, as where one surveys his land into building lots, and sells them or any of them with reference to and bounding on streets thereon designated, he is not entitled to compensation at the opening of these streets by the city.[5] A purchaser from them is held to purchase subject to the dedication to the public, and the taking of his land for the streets in question, without compensation, is well warranted.[6]

To grade a street or alley already dedicated to public use is not an exercise of the Right of Eminent Domain so as to require compensation.[7]

[1] Chap. I. § 3, *ante*.
[2] Chap. I. §§ 3, 4, *ante*, and cases cited.
[3] People *v.* Mayor of Brooklyn, 4 Coms. 424.
[4] See Chap. II. § 8, *ante*, and cases cited.
[5] Livingston *v.* Mayor of N. York, 8 Wend. 85; Matter of 39th Street, 1 Hill, 191; Chap. V. § 21, *post*, and cases cited.
[6] McKenna *v.* Commissioners, Harper, 381.
[7] Taylor *v.* City of St. Louis, 14 Mis. 24.

By the civil law which prevails in Louisiana and on the continent of Europe, and which prevailed in the colony and city of New York under the Dutch government, proprietors were not entitled to compensation for land taken for streets. There was no right in the adjacent owners to the soil of the road either during the use or upon a discontinuance. Under this rule, whoever accepted a grant from the government did it with the knowledge that it was subject to the exercise of the right of taking a part of the land for highways. He regulated the compensation he gave accordingly; and as there is not in the civil law a trace of the notion of reverter upon a discontinuance, the price could not have been affected by such an expectation.[1]

This rule, too, was embodied in one of William Penn's conditions to settlers in Pennsylvania; and hence the courts of that State hold that under this provision the land may be taken without compensation.[2]

Where land has once been taken by the legislature for a public use, and a full compensation paid therefor, if the legislature afterwards devote it to another public use of a similar kind, the original owner is not entitled to any further compensation.[3]

But where a turnpike was converted to the use of a railroad company, the owners of the land taken for the turnpike, who had received compensation therefor, were held not to be estopped from claiming compensation for damages sustained by the construction of the railroad.[4]

Urgent public necessity may sometimes justify a taking of private property without compensation, — such as the pulling down houses and raising bulwarks for the defence of the State against an enemy, and seizing provisions for an army in times of war.[5]

§ 16. When it must be made. While all agree in the justice and necessity of making compensation for private property taken for public use, jurists are somewhat divided as to the times when it should be made. Must it precede the taking of the property, or can it be made after? Many have held, that the payment must precede the seizure,[6] and the courts would enjoin all proceedings until it was made.

The more general opinion now seems to be, that if the legislative act granting the power to take lands provides a safe, secure

[1] Hoffman's Treatise on Corp. of N. York, pp. 258, 259; Code of Louisiana, Arts. 700, 703; Frederician Code, Vol. 1, pp. 401, 402; Taylor's Elements of Civil Law, 463, 472; Renthorp *v.* Bourgh, 3 Martin, (La.) 97.

[2] McClennachan *v.* Curwen, 6 Binn. 509, and 3 Yeates, 362.

[3] Chase *v.* Sutton Man. Co. 4 Cush. 152.

[4] Mifflin *v.* Railroad Co. 16 Penn. St. 182.

[5] Parham *v.* Justices, &c. 9 Geo. 349.

[6] Dou9hty *v.* Somerville and Easton R. R. Co. 3 Halst. Ch. 51; Haight *v.* Morris Aqueduct, 4 Wash. C. C. 601; Thompson *v.* Grand Gulf R. R. Co. 3 How. (Miss.) 240.

and fair compensation, and a ready means of ascertaining the amount, payment need not precede the seizure of the property. The means provided for securing the compensation must be of such a character as that the owner of the land will run no risk, and there must be no unreasonable delay in ascertaining the value of the land taken, and in payment of the compensation.[1]

§ 17. How estimated. The legislature must provide in the act authorizing the taking, a means of estimating the value of the property taken; and this may be done by an arrangement between the parties, or by commissioners appointed for the purpose, or by a jury.[2]

We may arrange the different cases of property taken for public use into four classes, in respect to the compensation to be made therefor; and the rule of appraisement will vary in each.

(1). Where the owner of the property is in no way benefited by the proposed public work. This must often happen, and indeed always will, unless the owner of the property can have himself some use of the improvement, or unless the value of his remaining property is thereby enhanced. In all such cases he should receive the full value of his property.

(2). Where his remaining property is benefited. If a street be opened, and land belonging to A. worth $2000 be taken, while his remaining property is increased in value $1000, this should be set off against the value of the property taken, and he should only receive $1000 in money.[3]

(3). Where all the land of an individual is taken, so that none is left to be benefited, he would be entitled to its full value.

(4). When part of a lot is taken and the part left is so small or so irregular as to be worthless, or is greatly diminished in value. Here compensation should be made for the land taken, and also for the damage to the residue not taken. This damage may be adjudged either by a payment in money equal to the damage, or by buying the whole lot at a fair price. Thus the owner would be compensated, and the loss, by its depreciation in value, fall upon the public. In ascertaining the value of the land taken, inquiry must be made into all legitimate uses to which it could be appropriated,[4] but no mere speculative advantages which may arise from its use are to be taken into account.[5]

[1] Jackson *v.* Winn, 4 Litt. 323; Willyard *v.* Hamilton, 7 Ham, (2d part,) 112; Pittsburg *v.* Scott, 1 Penn. St. 309; Rubottom *v.* McClure, 4 Blackf. 505; McCormick *v.* Lafayette, 1 Carter, (Ind.) 48; Bloodgood *v.* M. and H. R. Co. 18 Wend. 1; Beekman *v.* S. and S. R. Co. 3 Paige, 45; Bonaparte *v.* Camden and Amboy R. R. Co. 1 Bald. 205; Day *v.* Stetson, 8 Greenl. 365.

[2] Cushman *v.* Smith, 34 Maine, 247; Armstrong *v.* Jackson, 1 Blackf. 374; Van Horne's Lessee *v.* Dorrance, 2 Dallas, 313.

[3] Livermore *v.* Jamaica, 23 Vt. 361; Brown *v.* Cincinnati, 14 Ohio, 541; McIntire *v.* The State, 5 Blackf. 384; Jacobs *v.* Louisville, 9 Dana, 114; Betts *v.* Williamsburgh, 15 Barb. 255.

[4] Young *v.* Harrison, 9 Geo. 359.

[5] Rice *v.* Turnpike Co. 7 Dana, 81.

§ 18. REMEDY FOR DAMAGES. It seems to be unanimously held, that when the statute granting the power creates and specifies the means of obtaining and enforcing the payment of the compensation, they must be strictly adhered to, and no other remedy will be allowed.[1]

CHAPTER V.

TAXATION AND DEDICATION.

§ 19. WHY TREATED OF. While considering the Right of Eminent Domain, we found that it was sometimes confounded with the power of TAXATION. There is also another mode of taking private property for public use, called DEDICATION. Now these two differ from Eminent Domain, inasmuch as there is no compensation for the property taken; but it is often sought to confound them with it. To these two subjects, therefore, we will devote this closing chapter of our essay, and endeavor to point out wherein they differ from our subject of Eminent Domain.

§ 20. TAXATION. Writers on natural law regard this as one of the attributes of sovereignty. It is exercised in some countries by the monarch, in others by parliaments, and in our country by Congress for national objects, and by the legislatures of the various States in regard to their internal concerns. Vattel says: "If the income of the public property or of the domain is not sufficient for its public wants, the State supplies the deficiency by taxes. These ought to be regulated in such a manner as that all the citizens may pay their quota in proportion to their abilities and the advantages they reap from society. All the members of civil society being equally obliged to contribute according to their abilities to its advantages and safety, they cannot refuse to furnish the subsidies necessary to its preservation, when they are demanded by lawful authority."[2] This is the principle of the power, and the foundation on which it rests. We have seen, in considering compensation, that a taking by Eminent Domain is not a contribution by the owner to the expenses of the State, as his proportionate share, but as so much beyond his share. Taxation, on the contrary, exacts money or services from individuals as their respective shares of any public burthen.

Again, taxation operates upon a community or a class of persons as a community, and by some rule of apportionment. The exercise of the Right of Eminent Domain operates on an individual and without reference to the amount or value exacted from any one else. Keeping these distinctions in mind, it will not be difficult

[1] Corwell *v.* Hagerstown Canal, 2 Carter, (Ind.) 588; Kemble *v.* White Water Valley Canal Co. 1 Cart. 285; Lebanon *v.* Olcott, 1 N. Hamp. 339; Stephens *v.* Middlesex Canal, 12 Mass. 466; Spring *v.* Russell, 7 Greenl. 273; Woods *v.* Nashua Man. Co. 4 N. Hamp. 527.

[2] Lib. 1, ch. 20, § 240.

to determine which of the two powers is exerted in any given case.[1]

Assessments of the expense of a public improvement upon the property benefited by it, are not a taking of property by Eminent Domain, but are levied by the sovereign power of taxation.[2]

Statutes authorizing towns, counties, and cities to subscribe for stock in railroad and turnpike companies, and to assess the expenses on the property of the particular locality subscribing therefor, have been generally held not to come under the head of acts taking private property for public use, but to a legitimate exercise of the power of taxation.[3] See, however, on the other side, the dissenting opinion of Lewis, J., in *Sharpless* v. *Mayor*, &c., 2 Am. Law Register, 85, and an article on the subject, same volume, page 25. But as yet the weight of authority is as we have stated it above.

§ 21. Dedication. Dedication is the act of devoting or giving property for some suitable object in such a manner as to estop a party from asserting that right of exclusive possession and enjoyment which the owner of property generally has.[4] It may take place —

(1). By *Prescription.* Where a man opens a road or highway over his land and allows the public to use it for a sufficient time, the public acquire a right to it by prescription, and he is presumed to have dedicated the land in the road or highway to the use of the public. The authorities differ somewhat as to the length of time necessary to accomplish the dedication by prescription; but all agree that twenty years' user is enough, in analogy to the law of adverse possession of real estate.[5] Some cases have, however, fixed it at twelve years,[6] and a note to a case in 11 East, 376, holds six years' user to be sufficient.

(2). *By the Act of the Owner.* Where an owner of property surveys land, lays out streets, and sells lots bounding on them as such, he is presumed to dedicate the street to the public.[7]

[1] People *v.* Mayor of Brooklyn, 4 Coms. 424.

[2] People *v.* Mayor of Brooklyn, 4 Coms. 420; Alexander *v.* Mayor of Baltimore, 5 Gill, 383; Bonsall *v.* Lebanon, 19 Ohio, 418; Extension of Hancock Street, 18 Penn. St. 26.

[3] Goddin *v.* Crump, 8 Leigh, 120; Talbot *v.* Dent, 9 B. Mon. 526; Harrison *v.* Holland, 3 Gratt. 247; Thomas *v.* Leland, 24 Wend. 65; Bridgeport *v.* Housatonic R. R Co. 15 Conn. 475; Nichol *v.* Mayor, &c. 8 Humph. 252; Sharpless *v.* Mayor of Philadelphia, 21 Penn. 147; Cinn., Wil. and Zanesville R R. Co. *v.* Commissioners, &c. 1 Ohio, St. 77.

[4] Cincinnati *v.* White's Lessee, 6 Pet. 431; Hunter *v.* Trustees of Sandy Hill, 6 Hill, 411.

[5] Gallatin *v.* Gardiner, 7 John. 106; Lansing *v.* Wiswall, 5 Denio, 213; State *v.* Marble, 4 Iredell, 318; Hamilton *v.* White, 1 Selden, 9; State *v.* Thomas, 1 Harr. 568.

[6] Colden *v.* Thurber, 2 John. 424.

[7] Matter of 17th Street, 1 Wend 262; Vick *v.* Mayor of Vicksburg, 1 How. (Miss.) 379; Canal Trustees *v.* Haven, 11 Ill. 554.

Or he may adopt the public official maps of a city;[1] and in general, bounding a lot on a street or a centre of a street is a dedication.[2]

So also describing a lot as No. ——, on a map laying out the streets, would be a dedication.

Land may be dedicated to pious and charitable purposes, for sites for court-houses, churches, and other public buildings. It has been applied to the reservation of a spring of water for public use to a public square in a village, and to a public burying ground.[3]

There must be some act of acceptance or some use of the land by the party to whom it is dedicated to establish the dedication, but this may be made at any time while the offer is unrescinded.[4]

Dedication is a question clearly of intent, and must be inferred from the acts of the party owning the land. No form is necessary, but the dedication for the purpose claimed must be made clearly apparent.[5] By dedication the owner loses the control of his property, and he cannot subsequently divest the public of its use,[6] and hence when the public apply it to its destined use, it is not a taking of private property for public use, and he is entitled to no compensation.

§ 22. The subjects treated of in this last chapter do not strictly come within the province of an essay on Eminent Domain, but we have thought it best to add a slight sketch of each, and to point out the leading distinctions between them. By observing these, we shall not be likely to confound these entirely distinct attributes of sovereignty and branches of the law.

We have considered briefly, but comprehensively, the whole body of the law bearing on the subject of Eminent Domain. It is a very important branch of the law, and is daily becoming more so, by reason of the construction of so many public improvements and the astonishing development of our internal resources.

In the brief limits of the present essay we have endeavored rather to give an accurate sketch of the law on the subject as it now stands in the United States, than to speculate or theorize as to what it ought to be. The authorities have been carefully collated, and it is believed, that the reader will find in our notes every case of any importance, bearing upon the Right of Eminent Domain.

[1] Matter of 17th Street, 1 Wend. 262.
[2] Matter of 32d Street, 19 Wend. 128.
[3] Hunter *v.* Trustees of Sandy Hill, 6 Hill, 411, and cases cited.
[4] Simmons *v.* Cornell, 1 R. I. 519; State *v.* Carver, 5 Strobh. 217; Curtis *v.* Hoyt, 19 Conn. 154; People *v.* Beaubien, 2 Doug. 256.
[5] Sinclair *v.* Comstock, Harring. Ch. 404; Skeen *v.* Lynch, 1 Rob. (Va.) 186; Biddle *v.* Ash, 2 Ashmead, 211; Durnell *v.* Barnard, 28 Maine, 554; Irwin *v.* Dixon, 9 How. 10.
[6] Cincinnati *v.* White's Lessee, 6 Pet. 481; Penny Pot Landing *v.* Philad. 16 Penn. St. 79.

Circuit Court of the United States. First Circuit.
Maine. April Term, 1857.

CHARLES SCUDDER, ADM'R. *v.* THE CALAIS STEAMBOAT COMPANY.

The registry acts of the United States do not require a disclosure of the equitable title of the vessel registered or enrolled, unless that title is in the subject of a foreign State.

Where an agent is employed to procure a vessel to be built in his own name, and to transfer the title eventually to his employer, and he fraudulently transfers the title to a stranger, with notice, the transaction creates a trust properly cognizable in equity.

In a suit in equity to enforce such a trust, all the equitable owners should be joined as parties, but if one is out of the jurisdiction and will not join in the suit, the court has power to proceed in his absence.

CURTIS, J. — This case has been argued in writing during the vacation on a demurrer to the bill. The material allegations of the bill are, that the plaintiff's intestate, residing in California, employed one William W. Vanderbilt, to act as his agent in procuring a steamboat to be built in the city of New York. That Vanderbilt was originally instructed to contract for the building of the boat in his own name, and have it enrolled in his own name when completed, and send it to California, when the entire title was to be transferred to the intestate, unless it should be agreed that Vanderbilt might become owner of two undivided twentieth parts thereof. That subsequently these instructions were so far changed as to direct Vanderbilt to have the boat enrolled in the names of four other persons besides himself, as owners of certain specified parts, respectively. That afterwards the deceased agreed with one Richard Cheenery, that he should own seven twentieths of the boat, and the deceased was to own the residue. That Cheenery and the deceased, and his representatives in California after his decease, furnished respectively thirteen twentieths, and seven twentieths of the moneys expended in building the boat. That one Vail was employed, either by the intestate alone or by him in conjunction with Cheenery, to go to New York, take charge of the boat, fit out and navigate her to California. That Vail and Vanderbilt, combining together, took the builder's certificate in the name of Vanderbilt, obtained an enrollment in his name as sole owner, and, in fraud of the intestate, sold the boat to an agent of the defendants, who

had notice of the intestate's rights; and the defendants' agent afterwards transferred the title to the defendants.

The principal ground taken in support of the demurrer is, that the employment of Vanderbilt to have this boat built and enrolled in his name as the sole owner, or in the names of himself and three other persons, as owners, when in truth the intestate alone, or he and Cheenery, were the owners, was an attempt to commit a fraud on the registry acts of the United States; and that this purpose so taints the whole transaction that a court of equity will not aid the administrator to vindicate rights of the intestate growing out of such a contract.

But this objection is founded on a misapprehension of the effect of the registry acts.

By the act of February 18, 1793, sec. 2, the same proceedings are to be had in enrolling as in registering vessels. The act of December 31, 1792, sec. 4, requires the owner applying for a register to make oath that he is the sole owner of the vessel, or an owner jointly with others, whom he names, and that he or they are citizens of the United States, and that there is no subject of any foreign state, directly, or indirectly, by way of trust or confidence, or otherwise, interested in such vessel or the profits thereof. The act of July 29, 1850, sec. 5, has changed this only so far as to require the particular proportions owned by each person to be specified.

But there is nothing in either of these acts which prevents the legal title from being in one person while the equitable title is in another, or which requires a disclosure of the equitable title unless its owner be a subject of a foreign state. The ownership referred to in the oath is a legal, in contradistinction to an equitable ownership. This was so held by this court, in *Weston* v. *Penniman*, 1 Mason, 306. I am not aware that the correctness of this decision has been doubted; and it is matter of every-day practice for vessels to be held in trust for citizens of the United States not named in the register or enrollment. Upon this ground the demurrer cannot stand.

Another ground is, that there is a plain, adequate, and complete remedy at law, and so no jurisdiction in equity.

But the employment of Vanderbilt to go to New York, contract for building a boat, and take the title in his own name, and pay for it out of the funds of the intestate, and then transfer the title to the intestate, or such person or persons as he might appoint, created a trust; and the sub-

sequent fraudulent violation of that trust by selling and conveying the boat to a third person, who purchased with notice of the fraud, makes a clear case for the interposition of a court of equity.

It is true the bill avers that the defendants got no legal title, or if they did it was affected with notice of the complainant's equity. But, besides being in the alternative, this allegation is merely a conclusion of law drawn by the pleader from the substantive facts stated; and these facts show that the last alternative is the correct one, and that the defendants did get a legal title charged with the same trust as existed while Vanderbilt held that title.

It is further objected that Cheenery, the other part owner, should have been joined as a party, or some excuse for not joining him assigned in the bill. To this it is answered that it does not appear by the bill that Cheenery was defrauded; and that, *non constat* but his equitable title was properly sold by Vail, who professed to be his agent for that purpose. But the difficulty is, that it is not distinctly averred whether it was or was not rightfully sold. This is a bill for an account, and for the transfer of title to thirteen twentieths of the boat. If Vail was jointly employed by the intestate and Cheenery, to take possession of the boat, and colluded with Vanderbilt to defraud both his employers by a sale to a third person, and such sale was made, I think Cheenery should be a party to a bill to set aside the sale, and for an account. *Brookes* v. *Burt*, 1 Bevan, 106. And the bill should either explicitly aver that Cheenery is no longer a tenant in common with the complainant, because his equitable interest was extinguished, or he should join, as a party complainant, or, if he refuses, he should be joined as a party defendant, or his absence from the jurisdiction should be averred. In the latter case, I think, the court may proceed in his absence; for though he is a necessary party, he is not an indispensable party under the act of February 28, 1839 (5 Stat. at Large, 321). *Shields* v. *Barrows*, 17 How. 130.

Upon this last ground the demurrer must be sustained, with leave to amend the bill.

District Court of the United States, District of Massachusetts. November, 1857.

THE WILLIAM D. RICE.

A court of admiralty has no jurisdiction to try questions of equitable title to vessels, or to enforce the equities between mortgagor and mortgagee of vessels; it can only pass upon the legal title.

WARE, J. — This is a libel for the possession of the Brig William D. Rice. The libellant alleges that he is the true owner, and formerly had, and ought still to have, the possession. But the brig is now in the possession of Simeon M. Mitchell and Nathaniel Heath, claiming title under a pretended sale by one Edwin H. Rice, in fraud of the libellant.

The libellant deduces his title from Edwin H. Rice. It is alleged that while the brig was on the stocks, Rice, the builder and owner, on the 15th of August, 1856, mortgaged the vessel to the said Simeon M. Mitchell, George S. Chaloner and Frost Warren, in trust to secure the payment of a note to Nicholas Mason, of $2125; that Mason, in October following, assigned all his right and interest in said note and mortgage to the libellant; that afterwards two of the trustees, Chaloner and Warren, on the 6th of April, 1857, assigned the note and mortgage to the libellant, but that Mitchell fraudulently concealed the note and refused to join in executing the assignment of the mortgage; that on the 1st of November, the libellant appointed Mason his attorney, with power of substitution, to collect the note and foreclose the mortgage; that Mason, March 7th, substituted Wm. A. Richardson, who, with the knowledge and consent of the libellant, took possession of the vessel then on the stocks, and foreclosed the mortgage.

In July, after the foreclosure, Rice, with Mitchell and others, it is alleged, launched the vessel against the will of the libellant, and Heath fraudulently procured for the brig a register under her present name (after she had been registered under the name of David Ransom, in another port), under pretended claim of ownership on the part of Heath.

The libel concluded with a prayer that the brig may be delivered to the libellant, and for such further relief as to

law and justice appertain. To this libel exceptions are filed by the claimants in substance: 1st. That the libel does not show a title in Ransom, nor that he is entitled to the possession. 2d. That this court has not jurisdiction to try the question whether the mortgage has been foreclosed. 3d. That the court has not jurisdiction to try the question whether Ransom has an equitable title, and to enforce the same. No right of possession is claimed by the libel independent of the right of property. The court is therefore called upon to determine whether the title is in the libellant as preliminary to the delivery of possession.

That courts of admiralty in this country have authority to pronounce on the title of vessels is, I suppose, too well established to be questioned. But when this is said, it is the legal title only that is meant. Mason's assignment to Ransom of all his right and interest in the note to him and the mortgage to trustees for his security, did not give him a legal title to the vessel. It gave him only a right to have that interest which Mason had transferred by the trustees, and that interest was not an absolute title, but only a title in mortgage. But the assignment of the mortgage by two of the trustees only was wholly inoperative. It transferred nothing. *Wilber* v. *Almy*, 12 How. 120; 2 Story's Equity, §§ 1230, 1231. It is alleged that the third trustee fraudulently refused to join in the assignment; but if so, I take it to be quite clear, that the court has no authority to compel him to join. The power to compel a specific performance of a contract in the execution of a trust is within the peculiar and exclusive jurisdiction of courts of equity. A court of admiralty has no such power. This article does not show any such interest in the vessel as will enable a court of admiralty to take jurisdiction of the case.

The libel then sets out another title, that the libellant has the proprietary interest in the brig under a foreclosed mortgage. In the case of the *Bogart* v. *Steamer John Jay*, 17 How. 399, it was decided that a court of admiralty had not jurisdiction to order the sale of a mortgaged vessel to pay the mortgage debt, nor to foreclose the mortgage by a decree, and transfer the property and possession to the mortgagee. In that case the vessel was mortgaged by the purchaser to secure the payment of the purchase-money. The libel contained two prayers for relief. The first was for a decree for the payment of the unpaid purchase-money, and that the vessel, with her equipments,

might be condemned to pay the same. This would have been the proper prayer if the mortgage had been a maritime hypothecation. The second was that the steamer might be decreed to be the property of the libellants, and the possession be delivered to them, which would have been a strict foreclosure. The court decided that, sitting as a court of admiralty, it had not the authority to grant either prayer. It could neither order a sale, as in the case of maritime hypothecation, nor by a strict foreclosure, make a judicial transfer of the property. The court quoted and adopted the doctrine of Sir John Nichol, in the case of *The Neptune*, 3 Hagg. 132, that the admiralty has no jurisdiction to decide on questions arising out of the mortgage of vessels between mortgagor and mortgagee.

The mortgage of a vessel to secure the payment of a pre-existing debt, does not rest on a maritime consideration, nor is it made a maritime transaction by reason that the thing mortgaged is a necessary instrument in carrying on maritime commerce, and used exclusively for that purpose. It is purely a land transaction, as the mortgage of any other chattel. It is not like the implied mortgage, or hypothecation of a maritime lien, when the consideration is purely maritime, as the lien of seamen for their wages; nor is it like the lien of material men, where the ship herself, in the view of the maritime law, is considered as a primary and principal debtor. In all these maritime hypothecations, there is some resemblance to a common mortgage. The creditor is considered as having a *jus in re*, a proprietary interest, in the things, but it is a qualified right of property. It is simply a right to be paid out of the thing, the *res* itself being treated as the debtor. The proper relief is that the thing be sold to pay the debt, and when that is paid, the thing is free. But with some points of resemblance, there is a clear and broad distinction. A mortgage is the conditional transfer of the whole property, and not of so much of it as is sufficient to pay the debt, and by a breach of the condition the title in law becomes absolute to the whole. Nothing remains in the mortgagor but an equity of redemption. But a marine hypothecation, whether express or implied, transfers to the creditor no more of the thing than the amount of his debt, and that is to be ascertained by a sale. There is nothing known in the contract, as I understand it, which is a proper foreclosure. There is no other mode of carrying it into execution but by a sale.

Such being the nature of a mortgage, and so broadly discriminated from the analogous security of a maritime hypothecation, and having nothing maritime in its consideration, the court have held that the rights of parties under such a contract do not fall within the jurisdiction of the admiralty.

But it is argued by the counsel for the libellant, that the court having an unquestioned right to pronounce on the title to vessels, it may decide other questions that arise incident to the principal questions which, standing by themselves, are not properly of admiralty cognizance; as in this case, it may take notice of the alleged fraud, though the jurisdiction over fraud, in itself and simply considered, belongs to another tribunal. This, with proper limitations, is undoubtedly true. But the difficulty in this case is, that the party in his libel admitting the whole to be true, has not shown a legal title, the only one that gives the court jurisdiction, but has shown at most an equitable right to have a legal litle. Now, in order to have that title legal, the court must exercise the powers of a court of equity, by compelling a conveyance. This it cannot do. If this were done, the court would have possession of the cause, and might proceed to consider whether it would take notice of the alleged fraud as incidental to the principal question. But until the court is in possession of the principal cause, it has no incident, and without encroaching on the exclusive jurisdiction of a court of equity, it cannot get possession of the cause.

My opinion is, that the libel must be dismissed with costs.

S. J. Gordon, for libellant.

B. R. Curtis and *C. E. Pike*, for claimants.

Court of Appeals of South Carolina. Barnwell District.

JOHN JOLLIFFE, EX'R. *v.* FANNING ET AL.

The Act of Assembly of South Carolina, of December 17, 1841, prohibiting the emancipation of slaves by will, does not render a will wholly null and void which contravenes its provisions, but only such parts of it as are illegal.

Nor is there anything in the policy of the State which renders such a will wholly null and void.

A correspondent in South Carolina has furnished us with the report of this case, which has excited a great deal of interest in that State, and also in Ohio.

Elijah Willis, of Williston, Barnwell district, South Carolina, made a will in 1846, in which two of the defendants were named as executors, and his property was divided among his relations. In 1854, being then at Cincinnati, he made another will, in which he ordered his debts and general expenses to be paid by his executors, and gave to them his slave Amy, and her seven children, with all their descendants, if any there should be at the time of his decease, with directions to bring them to Ohio and there emancipate them; and gave all the residue of his property to his executors in trust for the benefit of these slaves, with full directions as to the mode in which his bounty was to be applied. He appointed three executors of this will, of whom one only, the plaintiff, qualified; and this will was duly proved at Cincinnati. The earlier will was proved in South Carolina, and on the Ohio will being offered for probate there, a decree *pro forma* was made against it by the ordinary, and an appeal taken to the court of common pleas, and a trial had before a jury.

It appeared in evidence that the children of Amy, mentioned in the will, were also children of the testator, and that a little more than a year after the making of the later will, namely in May, 1855, Willis, in pursuance of his intention to emancipate these slaves, left his home for Cincinnati, and having arrived at the landing was about to proceed with the negroes to lodgings in the town, when he suddenly fell dead.

The defendants objected that the will was procured by fraud and undue influence; that the testator was of unsound mind; that the will was a fraud upon the law and

policy of the State of South Carolina; that it was null and void by the provisions of the act of assembly of that State, passed December 17, 1841.

The act of assembly is as follows:—

"I. *Be it enacted*, by the Senate and House of Representatives, now met and sitting in General Assembly, and by the authority of the same, That any bequest, deed of trust, or conveyance, intended to take effect after the death of the owner, whereby the removal of any slave or slaves, without the limits of this State, is secured or intended, with a view to the emancipation of such slave or slaves, shall be utterly void and of no effect, to the extent of such provision; and every such slave, so bequeathed, or otherwise settled or conveyed, shall become assets in the hands of any executor or administrator, and be subject to the payment of debts, or to distribution amongst the distributees or next of kin, or to escheat, as though no such will or other conveyance had been made.

II. That any gift of any slave or slaves, hereafter made, by deed or otherwise, accompanied by a trust, secret or expressed, that the donee shall remove such slave or slaves from the limits of this State, with the purpose of emancipation, shall be void and of no effect; and every such donee or trustee shall be liable to deliver up the same, or held to account for the value thereof, for the benefit of the distributees, or next of kin.

III. That any bequest, gift, or conveyance, of any slave or slaves, accompanied with a trust or confidence, either secret or expressed, that such slave or slaves shall be held in nominal servitude only, shall be void and of no effect; and every donee or trustee, holding under such bequest, gift, or conveyance, shall be liable to deliver up such slave or slaves, or held to account for the value, for the benefit of the distributees, or next of kin, of the person making such bequest, gift, or conveyance.

IV. That every devise or bequest, to a slave or slaves, or to any person, upon a trust or confidence, secret or expressed, for the benefit of any slave or slaves, shall be null and void."

At the first trial in the court of common pleas the jury returned a verdict for the defendants, thus refusing probate to the Ohio will. The court of appeals, at the December Term, 1856, ordered a new trial in an opinion which we publish below. Upon the second trial, a verdict was obtained for the plaintiffs. This trial is said to have excited

very great interest, and to have been very ably conducted on both sides; the plaintiffs' counsel, Messrs. Bauskett and Bellinger, having to sustain themselves against a strong family influence and the prejudices of the district in which the cause was tried; and their success is a tribute at once to their own ability, and to the impartiality with which justice is administered in the courts of South Carolina.

The opinion of the court of appeals is as follows: —

WITHERS, J. — When it is remembered that the sole question in this case is, whether the paper propounded as the last will and testament of Elijah Willis, should be admitted to probate, many of the topics and the discussion that has attended them must vanish, as irrelevant to the proper subject before us. Upon the subject of probate the inquiry is, whether there be propounded a valid will; not whether certain of its provisions are against law, statute or common, or against any such State policy as a court may notice. These last considerations belong to construction and administration, and, however they may operate to explode certain provisions, yet, if enough remains to make a will or testament, the same is undoubtedly entitled to probate. Whether we take one definition or another of a will, as that adopted by Ch. Kent, "a disposition of real and personal property, to take effect after the death of the testator," or that derived from the Roman law and approved by Swinburne, Godolphin, and Blackstone, especially for its precision, "the just sentence of our will touching what we would have done after our death" — it is always true, that if valid in part, though void in part as to its provisions, it is a will; and if it be, probate and letters to executor, or to one in lieu of him, should be issued.

Where it becomes necessary to draw from the contents of a paper presented as a will evidence touching its due execution and validity as such, any tribunal charged with the examination of that subject is authorized to scrutinize the contents. As, for example, whether a provision in the paper may effect the competency of an attesting witness, and whether the statute of 25 Geo. II., applies to make the witness a good one; whether all that is presented was executed by the testator, or a portion was not and has been surreptitiously interpolated; whether the contents be such as render the paper wholly void, by force of a statute, if any such there be, and the like. But if the paper be duly executed by one competent, agreeably to the forms prescribed, and in the presence of the requisite number of

credible witnesses, and contain the revocation of all prior wills and the appointment of an executor, (as the testamentary paper before us does,) and be silent, in fact or for want of validity, as to all other matters, it is a will, and must be admitted to probate accordingly.

This is not denied by those who oppose Jolliffe, the executor; but they say that the paper in question is void in all its parts, because, 1st, its provisions show it to be at war with the settled policy of this State as to slavery and emancipation; and 2d, those provisions make it void in whole, by virtue of the words of the 4th section of the Act of Assembly, 1841, as follows: "Every devise or bequest to a slave or slaves, or to any person upon a trust or confidence, secret or expressed, for the benefit of any slave or slaves, shall be null and void."

1. The first "item" of the paper before us is in contravention of the first section of the act of 1841. But the evidence shows that such provision, (which bequeathed certain slaves to the executors, to be carried to Ohio, and there emancipated,) has been superseded by the testator himself, who carried said slaves to Ohio in his life-time, there left them, and there they remain, so far as we know That this very item was not in conflict with the "policy of this State," prior to the act of 1841, cannot be affirmed, except by overruling the decision of *Frazier* v. *Executors of Frazier*, 2 Hill's Ch. 304. However such provision in a will may contravene the first section of the said act of 1841, it is quite material to inquire what consequence follows? Not that the whole will shall be void, but (says that act) that slaves bequeathed to executor for removal and emancipation, "shall become assets in the hands of any executor or administrator, and be subject to the payment of debts," or to distribution or escheat, as the case may be.

Here, then, is one of the latest prohibitions against emancipation, and the design to procure it by means of explicit testamentary provision; and yet when (not the policy of the law but) its express words are violated, the whole will is not annulled, but is only "utterly null and void, to the extent of such provision;" and the executor is expressly recognized and held to the execution of a trust legislatively substituted for that vacated, to wit: to hold the slaves, whose emancipation is intercepted, as assets for payment of debts, for distribution, or for escheat. It is thus manifest that if the slaves transported to Ohio by Elijah

Willis, in his life-time, were now here, and in the hands of his executor, the will of the deceased would not be void, *in toto*, on that account; but by plain words in the act of 1841, would subsist for such purposes as should be lawful. If, therefore, a will containing such provision, and applicable to an existing state of things, be not excluded from probate by the last and most concentrated exposition of the legislative will, or the "policy of the State," how shall we exclude from probate a will, the obnoxious provision of which is rendered null by the act of the testator, by virtue of a supposed policy to be extracted from an antecedent course of legislation, gradually becoming more stringent, it is true, against the emancipation of a slave, but far more mitigated in every feature and at every step than the act of 1841?

We have been led to use the terms "policy of the State," because a ground of appeal and much argument employed to support it, suppose that the proffered will meets total destruction from that source. If more be meant by "policy," than the will of the sovereign power, as ascertained by fair construction of constitution or statute proclaiming that will, it is prudent to say that, as a court, we have no other source of information as to anything that may be called policy; that no safe rule of decision, in a particular case touching the right of individuals, can be derived from the arena of politicians — from the heat and light of a current contest, however intense and however momentous the subject, and the consequence involved; from any condition of public opinion, co-extensive though it be with the limits of the State, but as yet not moulded into the semblance and substance of law. In fact, if the thing be possible, the more exasperated may be the political contests of people or States, while engaged in the forum of high debates, the calmer should be our duty to preserve the judicial atmosphere when the question enters the forum, where it must rest alone upon existing law. Resorting, then, to our only source of ascertaining "policy," or a legitimate rule of decision, to wit: the statutes as to emancipating a slave, we might say, were it required for the case, that it would be difficult to find in any or all our acts of assembly, such restraint upon the right of slave property as prohibited the master from carrying his slave to Ohio, and clothing him with such freedom as he could there bestow. But we have seen already that any opinion upon this subject will not settle the question of probate claimed

for the will propounded; that if this effort to emancipate had been left for the executor to undertake, and the slaves so to be disposed of were here in his hands, nevertheless probate must be granted; the first section of the act of 1841, contemplates it. There is an executor appointed; he is charged by law, as well as by the will, with payment of debts; he is by law invested with the legal property in personalty, to be held for the trusts of the will if lawful, and so far as they are so, which cannot be decided upon a question of probate; and, consequently, if this court were to explore a proper or improper field for the policy of the State, it would, for the purposes of the present question, be a fruitless exercise, however otherwise engaging.

But secondly — Does the fourth section of the act of 1841 utterly destroy this will? Its terms have been quoted. To maintain this position, the argument assumed, and was obliged to assume, that "devise" meant will, and that "bequest" meant testament; for a devise or bequest for the benefit of a slave is declared null and void. Chancellor Kent, in Lecture 68, first paragraph, says: "When the will operates upon personal property it is sometimes called a testament, and when upon real estates a devise; but the more general denomination of the instrument, embracing equally real and personal estate, is that of last will and testament." If it be admitted that in certain instances and circumstances, the words in question may have been used as is contended, still, without weighty reason, we should not wrest them from the more popular and general sense; and that certainly is, that they mean provisions in a will and testament; much less should we disregard what may be here considered the context, to wit; the 1st and 3d clauses of this act. They certainly distinguish between bequest and will or testament, and the first section expressly uses the word "provision" as equivalent to bequest, or deed of trust or conveyance, and confines the word bequest to the particular kind of bequest described. There is no reason to enlarge the meaning in the 4th clause beyond that in the first; no more reason that a will should totally perish because of one provision, devise or bequest, than the other. It would, indeed, be most unreasonable to hold that a will should totally fail, in all its studied and beneficent provisions, merely because a small gratuity should be specified for a favorite slave; and such would be the consequence of the rule of construction which is urged upon us. Surely it is enough to subserve any ideas

of policy or any necessary or reasonable sense of this law, to apply it only to the obnoxious provision, by way of devise or bequest, that the great right of testamentary disposition may not be too boldly invaded; *ut res magis valeat quam pereat.*

If, however, the interpretation proposed be allowed, another essential question lies behind; one of no little consequence, to wit: whether the beneficial interest, the trust, be for the benefit of slaves; and if that be resolved in the affirmative, still another question remains, to wit: if the appointed trust fails, whether the executor must not hold for the next of kin, (supposing he cannot take beneficial interest to himself,) or in case there be no legatee or distributee capable to take, whether he must not hold subject to the right of the State on escheat. Now whether the slaves carried to Ohio by Willis, have thereby acquired the status of freedom, and so can take the legacy designed for them, is a matter that would call for grave consideration, on which we need not decide upon this mere question of probate, and which we ought not to prejudge, since it may become, probably is pending, as a distinct question in another forum. We have been referred to much learned discussion, more or less directly bearing upon the question, but from what is already said, it is apparent that its discussion now and here would be merely voluntary. But if such questions as are herein indicated, do or may arise upon the construction of the paper in question, and when, as has been shown, their determination in any way leaves still what may be a good will, is it not an argument to ask, how can they be appropriate to a proceeding for probate?

The foregoing must serve to dispose of all the positions that seek a foundation in the act of 1841.

The other points taken concern the evidence upon the questions of fraud upon the testator, undue influence, and incapacity by reason that he was insane.

As to fraud — There was none upon Willis as to what the will contained. It was executed in duplicate. One copy was read while he had before his eyes the other. He retained one, the other was left in Cincinnati, where it was admitted to probate. But it was surmised that there was evidence tending to show that Jolliffe, the appointed executor, had designs to devise some means whereby he should cause the body of testator's slaves, now in Barnwell district, and whom he is directed to sell, to be emancipated. Whether the evidence affords good ground to be-

lieve that such is Jolliffe's design, we do not determine; but assuming it as established, it is presumed that those thereunto moved by interest know how to enforce the due and honest execution of trusts by Jolliffe, and the conclusive answer is, that the infidelity of Jolliffe, cannot make a fraud upon the testator in the execution of the will.

As to undue influence — The testimony is wholly silent as to any such influence over Elijah Willis in the matter of his will, unless it can be imputed to the negro woman Amy, whom he allowed, though his slave, to occupy a level with himself, and to become the mother of his children, or unless something of that kind can be derived from the provisions of the will. The substance of the evidence upon this point is found grouped in the report; and when it is remembered that the will was made in Cincinnati in the absence of Amy, more than a year before the testator's death, a copy retained by him during the whole time; and when we advert to the numerous cases in our own books, of a character so much stronger than this, when this objection has been overruled, it would be a waste of time to argue the subject. There is no evidence that the testamentary paper was not the free and voluntary act of the testator; nor can the disgust which is properly felt at the course of conduct that supplied the motive to make such provisions as the will contains, in favor of such beneficiaries, be permitted to blind us to the fact, that such motives and such provisions and such objects of bounty were perfectly consistent with the unconstrained pleasure and natural sentiments of such a man as Elijah Willis was.

As to insanity, it appears to this court that there is quite as little ground (to say the least of it) to impute that, as there is to allege undue influence. If, as already said, the contents of the will show nothing inconsistent with such reason and natural emotion as might control a man in the unhappy and disreputable condition of Willis, it was not insanity in him to obey their dictates. Nor can this be found in the fact that, in his efforts to confer freedom and fortune upon his negro slave mistress and his own children by her, he also included their half-brothers; and that their grandmother also, so far as transportation to Ohio is concerned, subsequently attracted his attention, and he carried her with the rest. If he had determined to sell Amy and her children, it would have been in accord with the prevailing sentiment among us to include in the transfer

Amy's mother likewise. It is not at all strange, therefore, that he included her in the party that he carried to Ohio. Not in the least does it argue insanity that Willis should resort to such a man as Jolliffe, under the advice (as it is said) of Mr. Clay. To what other description of people should he apply to aid in the object he had in view? He could not find suitable coadjutors in the next of kin here, and would be met by the opposition of the law, and no doubt that of individual and general sentiment in any trust he might attempt to lodge in any one within this jurisdiction, calculated to carry out his natural designs; and, therefore, however he may have detested abolitionists, he relented so far as concerned Amy and her family, and circumstances drove him to a place and people beyond the limits where slavery prevails, to find the aid which he needed; but as respects the slaves left by him in this State, he did not adopt the advice pressed upon him by Harwood to free them.

As to the moody silence and reserve; the avoidance of society; a sigh when he beheld the living examples of his shame, and such like exhibitions, reported by certain witnesses, it is most obvious that the more rational his reflections and forecast, when he contemplated the channel through which he must send down his blood to posterity, and the probable fortune of those who had sprung from him, the deeper must have been his gloom, the more bitter his remorse. Advancing age and approaching death could but heighten their intensity — surely we have no warrant to trace such circumstances to insanity.

As to the objection that the paper propounded is not sufficiently identified, by unobjectionable evidence as a copy of the will executed in duplicate in Cincinnati, (and with exact formality it is not denied,) it is enough to say, we can see no plausible foundation for such objection.

It results that we can discover no legal basis upon which the verdict can stand; we apprehend it may be due to the idea the jury had of an insuperable obstacle to be found in notions of State policy, or in the provisions of the act of 1841, neither of which affords them any foundation; and we, therefore, order a new trial.

O'Neal, Wardlaw, Whitner, Glover and Munro, Judges, concur.

E. Bellinger, Jr., and *J. Bauskett*, for plaintiff.

A. P. Aldrich and *W. A. Owens*, for defendants.

Supreme Court of Arkansas. January Term, 1857.

Before the Hon. Christopher C. Scott, and the Hon. Thomas B. Hanley, Justices.

Lytle *et al. v.* The State of Arkansas *et al.*

An attorney at law may purchase of his client an interest in the subject-matter of the suit, in consideration of services rendered and to be rendered in the prosecution of the suit, and become bound for the costs in the prosecution of his own and his client's rights, when suing jointly with his client, without the violation of any law of maintenance or champerty in Arkansas.

A sale and conveyance of land *pendente lite* in this State, is not void; the vendee in such case takes the interest conveyed subject to every defence against his vendor, and holds it precisely as he held it in every respect as to other persons.

Scott, J. — The defendant, Bertrand, insists in his answer, by way of plea, that the conveyances to Fowler having been made *pendente lite*, are, for that reason, void; and also otherwise void for champerty appearing upon their face.

The recitals upon the face of one of the deeds, upon which this objection is predicated, are to the effect, that the heirs at law of Nathan Cloyes, deceased, are entitled to a "pre-emption right" to the land in controversy in this suit, "concerning which the said Fowler, as the sole attorney and solicitor, has been for several years prosecuting a suit in chancery, in the name of said heirs, against the State of Arkansas, and several persons, and which suit has been lately decided by the supreme court of the United States in favor of said heirs, but which decision may not be final, and further litigation may be necessary to put said heirs into possession of said tract of land, which is their lawful right. Now, in consideration of the services of the said Fowler, as such attorney and solicitor, already rendered and hereafter to be rendered by him, or his substitute, until the final determination of said litigation, the said party of the first part grants, &c., one undivided fourth part of the entire right, title, interest, &c., in full for such services and the expenses of such litigation, to be borne by the legal representatives of Ben. Desha, deceased, who are also interested in said tract of land." And the same instrument of writing also constitutes Fowler sole attorney and solicitor, and also attorney in fact, with power of substitution, and full authority to

institute and prosecute all necessary suits for obtaining possession of the land in question, to final judgment and satisfaction, and to compromise any matters relating to the affairs.

In the other deeds, the recital is merely to the effect that the consideration of the grant of a like interest of one fourth by the other heirs at law, is the "services" of Fowler already rendered, and to be hereafter rendered.

The question arising upon this state of facts, involves the inquiry, whether the English law of champerty is in force in this State, to such an extent as to invalidate these deeds, and on that ground constitute an answer to the relief sought by the complainants.

The common law, so far as the same is applicable and of a general nature, and all the statutes of the British parliament in aid of, or to supply the defects of the common law, made prior to the fourth year of James the First, (A. D. 1607,) not inconsistent with our own Constitution and laws, are in force, and the rule of decision in this State, unless altered or repealed by our General Assembly. And when, by our laws, no punishment has been provided for any crimes or misdemeanors under the English law in force here under our statute, the punishment shall be by fine and imprisonment; the one not exceeding one hundred dollars, and the other not exceeding three months. Digest, ch. 35, p. 255.

It is not to be doubted, but that the several English statutes of champerty were in aid of, and to supply the defects of the more ancient general law of maintenance; a law which peremptorily forbids the transfer to another of a right to seek redress in a court of justice. These statutes were designed to render this law of maintenance more efficient and perfect; and was suggested from time to time by the exigencies of the times, as the history of these enactments clearly enough show. The law of maintenance is to be traced no farther back, in the history of the common law, than to about the close of the eleventh century, when the Norman conqueror, having subjugated the country and despoiled the natives of their property, and dividing the whole kingdom into sixty thousand knights' fees, had distributed them among his followers. "The first statute against champerty was passed in the year 1275, St. Westm. 1, ch. 25, 3 Edw. I. It provided that no *minister* of the king should *maintain to have part.*" Upon which Lord Coke says: "Hereby it appeareth that it is no

champerty unless the State, &c., (that is, the agreement to divide the estate,) "be for maintenance." See *Bayard* v. *McLane*, 3 Harr. 210. The terms of that statute, more fully set out, were: "No minister of the king shall maintain pleas, suits or matters depending in the king's courts for lands, tenements or other things, for to have part thereof, or other profit by covenant made; and he that doth so, shall be punished at the king's pleasure." 5 Com. Dig. 16, Main. A. "According to the commentary of Lord Coke, 2 Ins. 208, "by the words, depending in the king's courts, it is declared that, regularly, champerty is, *pendente placito*, and that within the words of the statute 'or anything,' are included leases for years, and other goods and chattels, debts and duties." See 3 Younge & Jervis, 134.

By 2 St. Westm. ch. 49, 13 Edw. I., the chancellor, treasurer, justices, the king's counsel, clerks in chancery and of the exchequer, and other officials named, were forbidden to purchase, or to take by gift, lands or other matter in suit, *pendente lite*. 5 Com. Dig. 18. Upon which Lord Coke remarks, in his reading upon this act: "True it is, that if any other person, (*i. e.* than the chancellor, treasurer and other persons named in the act,) purchase *bonâ fide*, depending the suit, he is not in danger of champerty, but those persons here prohibited cannot purchase at all, neither for champerty or otherwise, depending the plea." 2 Inst. 84, cited in *Stanly* v. *Jones*, 7 Bing. 377. These prohibitions — that in the one act, confined to the king's minister, and in the other, extended to certain officials mentioned therein — were afterwards, by St. 28 Edw. III., ch. 11, (passed A. D. 1300,) extended to all persons, under still higher penalties, with the following proviso in the body of the act, to wit: "But it is not to be understood hereby that one may not have counsel of pleaders, or of learned men for his fee, or of his relations or neighbors." See 3 Younge & Jervis, 135, for a full copy of this act.

Next in the order of time was the statute *de definitio conspirat.*, 33 Edw. I., St. 2, which declares that "Champeters, be they who move pleas or suits, or cause them to be moved by their own procurement, or by others, and sue at their proper costs, to have part of the land in variance, or part of the gains." 5 Com. Dig. 16.

Besides these, there were other statutes passed in aid of the law of maintenance, forbidding persons to bind themselves by oaths, covenants or otherwise, to move or maintain pleas for others, or "by letter or otherwise," to

"maintain quarrels in the country to the let of the common law." Ib. 17, 18.

In Hume's history of England, (vol. 2, p. 320,) the state of society, out of which sprung these stringent enactments, is referred to in connection with the Statute of Conspirators, above cited, and it is stated by this historian, that "Instead of their former associations for robbery and violence, men entered into formal combinations to support each other in lawsuits; and it was found requisite to check this iniquity by acts of parliament." It might be worthy of further inquiry, if time would permit, whether this maddened state of public mind must not be legitimately traced to an unsettled state of property, resulting from a greedy assumption of estates by the crown for forfeitures as escheats, and the re-granting of those estates to favorites and followers. At any rate, such inferences seem legitimate as connected with the subsequent parliamentary enactments in aid, and for strengthening the law of maintenance, occurring somewhat over two centuries afterwards, in the reign of Henry the Eighth. It was in the year 1538, that this king had completed the suppression of the monasteries in England, and proceeded to escheat their estates, and grant them to his courtiers and parasites; and in the year 1540, he suppressed the Order of the Knights of Malta, and seized and disposed of their estates and revenues. And it was in the latter year, (38 Hen. 8, ch. 9,) that by act of parliament, "all former statutes against maintenance, champerty, &c., were confirmed;" and by the same statute, "that no person should unlawfully maintain or procure maintenance in any of the king's courts, &c., in any of his dominions, which have authority to hold plea of lands, &c., nor retain for maintenance of any sort, &c., on pain, &c., and no person shall buy or sell, or by any means obtain any pretended right or title, &c., to any manor, lands, &c., unless he who sells, &c., his ancestor, or they by whom he claims, have been in possession thereof, or of the reversion, or remainder, or take the rents or profits by the space of a year before the bargain, on pain to forfeit the value of the lands, &c., so bought and sold." 5 Com. Dig. 17.

Thus, from time to time, stimulated to preternatural growth in strength, and all for the aid of violence and wrong in possession, the law of maintenance ultimately became monstrous and intolerable, and was destined to wane, if not altogether starve out, wherever justice might

have sway, and right might be respected and sustained. And as a general fact, such has been the result both in England and in this country. Justice and right having been found indispensable for the growth of "commerce" — which soon afterwards "became king," and a greater *civilizer* than all the EDWARDS and HENRYS — it was, therefore, her policy to uphold the one, and respect and vindicate the other.

After such a glance as this, at the rise and progress of maintenance, in connection with its ultimate extensive ramification throughout the body of the English law, one can better appreciate some of the cant phrases in the books as to the "odiousness" and "crushing influence," which have come down even to our own day; and may be better able to comprehend the true policy of that law, and thereupon determine more advisedly whether it accords with the policy of the great current of the controlling laws of our own times in this country. And, perhaps, one may better understand, too, why it was, that in subsequent reigns, the English people were so clamorous for the right to resort to the courts of justice for the redress of grievances; and, that to this day, in that country, the public mind is so much engaged with judicial reforms, all having for their end the making of justice of easy access to every man.

At any rate, although it may be true that it is no valid objection to a law otherwise good, that it arose out of rapine and violence, and in its origin was made an instrument of despotism and wrong; still, when it might be made a question, whether a mere ancillary part of such a law was to be regarded as in force in this country, after the main law had been displaced by inconsistent affirmative legislation, the entire history of the whole can but throw some light upon the true character of what may be alleged to remain.

In this view, also, it may be seen that champerty, although originally applicable only to land (*campum partiri*), was soon equally applicable to personal property; and, although at one time confined to officers of the crown, was soon equally extended to all persons, while at the same time, the general law of maintenance was in a like ratio extended not only by these means, but otherwise by statute. It is also to be seen that unlawful maintenance was at the root of the whole matter, and the distinction between that and lawful maintenance was never lost sight of.

It is no champerty, (says Lord Coke, already cited,) unless the "State, &c., (that is, the agreement to divide the estate,) be made for maintenance. So it is, in like manner, to be seen, that the proper advocacy of causes by persons belonging to the legal profession was not unlawful maintenance; and, therefore, it is no maintenance if a counsel take fees for his advice and assistance." 2 Inst. 564; 5 Com. Dig. 19. "So if an attorney expends his money for his client, to be repaid." Ib.

And in this connection may be noticed a distinction berween the English system of administering justice and our own, touching attorneys and counsellors, and their compensation, which is an important ingredient in considering this question of champerty. Under the English law, there was a total incapacity in counsel to make any contract whatever with his client, on account of his professional services, much less a contract for a share of the thing in suit, although he was permitted to accept, as a gratuity, a fee. And the same was true of the attorney, who could make no other contract with his client than that which the law had already made for him, in assigning to every service its fixed and appropriate compensation. It was this absolute incapacity of contracting with each other, which placed the attorney and client in the same category with husband and wife, and guardian and ward, between whom no dealing can take place, having the sanction of legal obligation. Hence, a contract between a counsellor, or an attorney and his client for a share of the thing in suit, under such a state of law, would have been illegal in a three-fold sense,—on account of the restrictions upon the sale and purchase of the whole thing; of the part of it; and of the incapacity of the attorney or counsellor to buy.

In this country there is no distinction in grade between attorneys and counsellors, and there is no distinction, as to this, in reference to compensation for professional services. Both stand on the same footing as to such contracts. And it is not to be questioned, that our laws recognize the claim of an attorney at law for professional services, as a legal demand; and that, as such, he can recover a reasonable amount either on the ground of contract, or upon a *quantum meruit*. And physicians' claims, for medical attendance and skill, stand, with us, upon the same general footing; although they also stood in England upon the same footing with counsel in reference to compensation.

The right of making contracts is a high personal privilege of the citizen; and physicians and lawyers claim that privilege in their capacity of citizens, insisting that, by becoming professional men, they have lost no right pertaining to a citizen; at the same time, recognizing the authority of the legislature to restrain and qualify this privilege as to contracts in all points where, in their judgment, the public safety or the public good may require it; but that, until so restrained by legislation, the courts are bound to recognize and protect this privilege, as well as every other personal right pertaining to the right of property, so amply secured to every citizen, whatever may be his calling, under our Constitution and laws.

When the courts hold, in the face of the common law to the contrary — in force in this country by express legislative enactment and otherwise — that such demands are legal ones, their decisions can rest upon no solid foundation, other than the recognition of this claim of right to contract, based upon our Constitution and laws, which, by reason of its inconsistency with the English law, inhibiting the right to contract, has wrought its repeal, or, more accurately, has prevented so much of the English law from having force in this country. Because, if, by the adoption of the common law, in gross, as the rule of decision in this country, those provisions of that law were in force, which denied to a counsellor any capacity to contract with his client on account of his professional services, and which denied to the attorney any such capacity, beyond that which the law had made for him in assigning to every professional service its fixed and appropriate compensation, the courts could not decide that a recovery could be had for professional services, founded upon any agreement as to such services, either express or implied.

These decisions, then, rest upon the ground that the incapacity to contract as to professional services, has been removed by inconsistent legislation in this country. In this State, as also perhaps in most, if not all of the other States, there has been no legislation on the subject, except the general provisions contained in the paramount law, that all free men, when they form a social compact, are equal, and have certain inherent and indefeasible rights, among which are those of acquiring, possessing, and protecting property, and of pursuing their own happiness.

It follows, then, that when the removal of the incapacity to contract for professional services is placed upon the

ground of inconsistent legislation in this country, and that legislation, as in this State, is only the constitutional declaration cited, it must be removed without any other qualification or restriction than that which attaches to the privilege to contract enjoyed by citizens in general. The disability under the English law was not, specially, that the counsellor could not contract with his client for a part of the thing in controversy as compensation for his services; but, generally, that in reference to these services, he could not contract at all. There was no provision of the law inhibiting the purchase of a part of the thing in dispute, which was peculiar to lawyers; it was a provision common to all persons. It is, therefore, requisite to know upon what basis that provision rested in the English law, in order to determine whether, under our legislation, it remains law in this State.

Beyond any reasonable doubt, the root of this doctrine was the principle of the common law, that a right of action could not be transferred by him who had the right, to another. "This principle was interlaced with the doctrines of maintenance and champerty, and was founded upon the same reason." Lord Coke says: "That for avoidance of maintenance, suppression of right and stirring up of suits, nothing in action, entry or re-entry can be granted over, for so, under color thereof, pretended titles might be granted to great men, whereby right might be trodden down, and the weak oppressed." *McLane* v. *Bayard*, 3 Harr. 209. Mr. Justice Buller says, in the case of *Master* v. *Miller*, 4 T. R. 340: "It is laid down in the old books, that for avoiding maintenance, a chose in action cannot be assigned or granted over to another. Co. Litt. 214, *a;* Roll. 245. The good sense of that rule," he proceeds to remark, "seems to me to be very questionable, and in early, as well as modern times, it has been so explained away, that it remains, at most, only an objection to the form of action in any case. It is curious, and not altogether useless, to see how the doctrine of maintenance has, from time to time, been received in Westminster Hall. At one time, not only he who laid out money to assist another in his cause, but he that, by his friendship or interest, saved him an expense which he would otherwise be put to, was guilty of maintenance. Bro. tit. *Maintainance*, 7, 14, 17, &c. Nay, if he officiously gave evidence, it was maintenance; so that he must have a subpœna, or suppress the truth. That such doctrine, repugnant to every

honest feeling of the human heart, should be soon laid aside, must be expected."

In the case of *Thalthimer* v. *Brinkerhoff*, 3 Cowen, 645, the Chancellor says: "It was a principle of the common law, that a right of action could not be transferred by him who had the right, to another. When we seek the reason of this rule, we find it in the motive already mentioned, an apprehension that justice would fail and oppression would follow, if rights of action might be assigned. "Nothing," says Lord Coke, [as already more fully copied above in the quotation from *McLane* v. *Bayard*]: "Feeble, partial and corrupt must have been the administration of justice, when such a reason could have force. In early times, however, the rule was rigorously enforced. As the entire right of action could not be assigned, so no part of it could be transferred, and no man could purchase another's right to a suit, either in whole or in part. Hence, the doctrine of maintenance, which prohibits contracts for a part of the thing in demand, was adopted as an auxiliary regulation to enforce the general principle, which prohibited the transfer of all right of action. But the rule of the common law, that rights of action cannot be assigned, has been in modern times reversed. The apprehension that justice would be trodden down, if property in action should be transferred, is no longer entertained; and the ancient rule now serves only to give form to some legal proceedings. In the courts of equity this rule was never followed; and these courts have always considered and treated the rule as unjust, and have supported assignments of rights of action. Experience has fully shown, not only that no evil results from the assignments of rights of action, but the public good is greatly promoted by the free communion and circulation of property in action, as well as property in possession."

Hence it appears, that the basis upon which the doctrine in question rested in the English law, was but that of a mere auxiliary regulation, to enforce the general principle which prohibited the transfer of all rights of action. Upon which the court, in the case of *McLane* v. *Bayard*, at page 209, proceed to remark: "And upon no other reason can we conceive why a bargain for a part or the whole of a thing in suit, (independently of the maintenance,) should have been an offence at common law. In this country, the rule is actually reversed. The laws of alienation, in respect to every species of property, promote its transfer

as more consistent with the condition of things here, and with public policy. By our laws, the transfer of a thing in action, or of a part of a thing in suit, may be made, and by the common law it is lawful for attorneys and counsel, in the regular exercise of their profession, to maintain the suits of others. If the service, therefore, be lawful, and the mode of compensation be now lawful, how can such a contract be champertous and unlawful?"

In the States of Virginia, New York, Kentucky, Tennessee, Connecticut, North Carolina, South Carolina, and perhaps in most of the other States, the provisions of the Stat. 2 Westm. ch. 49, and of 38 Hen. VIII. ch. 9, more or less modified, prohibiting the purchases and sale of pretended titles to land not in possession, have been reenacted. In some two or three of the States, the doctrines of those statutes have been recognized as a part of the common law. See note F, to the case of *Whitaker* v. *Cone*, 2d edit. of Johnson's Cases, p. 60.

But the provisions of these statutes, upon which so much of the law of maintenance and champerty rests for support in the English law, so far from having been reenacted in this State, have been met here by directly conflicting legislation, in the several provisions touching the sale of real estate held in adverse possession; whereby the right of "alienation and purchase" of every interest, title and estate therein, "has been enlarged almost to an unlimited extent," as this court said in the case of *Cloyes et al.* v. *Beebe*, 14 Ark. R. 489, where it was held, that, "under the several provisions of our statute, any right, title or interest in land, that will descend, may be alienated by deed, although the possession be adverse."

Such legislation must, in the repeal of the law forbidding the sale of real estate held adversely, if indeed it ever had any force in this State, also repeal so much of the law of maintenance and champerty as rested upon the old law; and there can be no serious question, therefore, but that, under the present state of the law, any interest, title or estate in real estate can be lawfully sold and purchased for a lawful consideration; and that the purchase and sale of a moiety, or other part, will stand upon the same footing.

The latter branch of the provision cannot be any more doubted than the former, unless it should be supposed that a vendor could not sell a moiety or other part when in actual possession: because the statute declared that the

sale shall be "with like effect as if he (the vendor,) was in the actual possesion thereof."

Hence, although it might be the law in England, in the year 1831, as held by Chief Justice Tindall, in *Stanly* v. *Jones*, 7 Bing. 377, that maintenance and champerty were not so much the buying of the thing, or an interest in the thing in litigation, as it was in the buying of the thing, or an interest in the thing for the purpose of maintaining and taking part in the litigation, it could not be law here, as to real estate held adversely, under our statute; because it would, in effect, render that statute inoperative, since it would be rare, indeed, that one would buy real estate, so held, with any other than a purpose to go to law upon his purchase.

But another Judge, Lord Abinger, in a later case, (A. D. 1843,) seems to have a different idea of what remains of the law of maintenance in England, its birth-place. We shall, probably, have occasion to cite him before we are done.

We conclude, then, upon this point, that the interest in the land in question could have been lawfully sold and purchased; and it remains to be considered, whether the professional services of Fowler, under the facts of the case, were lawful consideration for such sale.

The greatest difficulty in the way of arriving at accurate ideas on this point, is from the habit, that some have, of associating, in a peculiar manner, the idea of champerty with the lawyer and his services, and his client, while, in truth and in strictness, the English counsellor was further removed from champerty, as to his own client, than from his brothers. And, so far from his professional services being procreative of champerty, they could not beget it at all; because they were not accounted of any value, in point of law, so as to form the consideration of a contract with his client for a part of the thing in suit. It is, in this country only, that such legal value has been accounted to them by the law, and in awarding that legal value, as we have seen, the courts have proceeded upon the idea that the lawyer's work and labor stood upon the same ground as that of any other citizen; as did his legal capacity, also, to contract in reference to them. If so, it must be as lawful to pay debts, or buy land with, that may be lawfully sold, as that of any other citizen. If the English attorney had, upon the consideration of fees taxed to him, bought from his client an interest in the thing in suit, he

would have been guilty of champerty, not because these fees arose from his professional services, or because of the relation of attorney and client, but simply because he had purchased a part of the thing in litigation. And he would have done no less, but precisely the same thing, if he had taken money out of his pocket to form the consideration, instead of resting it upon the costs taxed to him. It is often said in the old books, that champerty was the most odious form of maintenance, and that was, because it was not only a violation of the general law, but also of the auxiliary one, which aggravated the offence. But it is never said, in addition to that, that the offence is still further aggravated in point of law, because committed by a lawyer, or was in any way connected with his professional services, or with his relation to his client.

There is nothing, then, in the common law notions of champerty peculiar to lawyers, or to their professional services, not common to other champertors, except that, as to the general law of maintenance, they stood upon a more favorable footing than other subjects of the king, for as much as they could lawfully maintain their clients' cases with their professional services, while another subject could not maintain a suit at all, without violating the law unless interested in, or related to, the party whose suit he might maintain. There is, therefore, no foundation for supposing, that by the adoption of the common law, we have adopted any provision of the champerty law in reference to lawyers, and the relations between them and their client, that is not equally applicable to every person.

When a part of the land in controversy may be lawfully sold, as in this case we have seen it might be, to say that a lawyer in this country cannot take money out of his pocket and buy with it from his client, is to say more than was ever said in England, when the law of maintenance was in its most rampant condition of monstrosity Because it was then allowed to be so, simply because the law forbade a sale and purchase of the land; not because of any incapacity of the counsellor to buy with his money from his client. If the land had been subject to lawful sale, he could have bought with his money; but, although he could have bought with his money, he could not have bought with his professional services, because they were accounted of no pecuniary value, and he could make no contract with his client in reference to them. But when, as it is allowed in this country, these services are of pecuniary

value in point of law, and contracts with reference to them are of as binding force in law, as when made in reference to the services of the citizen, to deny that they are a valid consideration for a purchase and sale, that may be otherwise lawfully made, is to stultify the decisions of all our courts, which have recognized their services as valuable, and subject to contract; and go back to the common law notion of the lawyer's incapacity to contract with his client in reference to his professional services. And if this is not done, then there is but one alternative, and that is to stop short and legislate. And while another department of the government, in doing this, would have ample power to regulate the right of contracting between attorney and client, in points where it might seem proper, all the argument would not be upon the side of an inhibition upon the attorney to become interested in the lawsuit, and in its result. There is nothing in our policy favoring the hampering of right and justice if presented for investigation within the time limited for legal remedies. And the door of justice is not shut to the poor, who may be oppressed. On the contrary, they have been the subject of statutory provision. Rights are nothing without the means of enforcing them. The subject-matter of the suit may be all the property to which the suitor can lay claim. Whether plaintiff or defendant, his credit may be based upon nothing else. The courts of chancery are ever open for relief against fraud and oppression, and they look with a scrutinizing eye to contracts which savor of either. If just suits are stimulated by such a policy, unjust ones are checked by the punishment affixed by our legislature to the offence of barratry, which is a fine in "any sum the barrator may be able to pay, not less than one hundred dollars, with imprisonment for six months." Digest, ch. 51, sec. 16, p. 362. And this, at least, does not seem to place us in a condition, as to these doctrines, far different from that of the English nation at the present day, if Lord Abinger is to be received as authority for the present condition of the law of maintenance in that kingdom. He says, in the case of *Findon* v. *Parker*, (11 Mees. & Wels. 682,) decided in the Exchequer of Pleas, in the year 1843: "The law of maintenance, as I understand it, upon modern constructions, is confined to cases where a man improperly, and for purposes of stirring up litigation and strife, encourages others to bring actions, or to make defences which they have no right to make."

The truth is, this whole law of maintenance, with its appendant law of champerty, has been in a very great degree displaced in modern times by the invention of statutes of limitation, which the States, generally, have adopted, as well as the English people, and of which our ancestors had no knowledge.

Perhaps we could not conclude this part of the subject better than by some further remarks of the Chancellor, in the case of *Thallhimer* v. *Brinkerhoff*, 3 Cow. 643: "The excitement of suits, is an evil when suits are unjust; but, when right is withheld, and the subject of a suit is just, to promote the suit is to promote justice, where the administration of justice is firm, pure, and equal to all; and where the laws give adequate redress for groundless suits, it is not easy to conceive that mischief can arise from opening the courts of justice to all suitors; or, from contracts by which the fruits of the suit may be divided between him who has the right of action, and him who has contributed advice, expense or exertion to institute the suit, or prosecute it to effect. If principles are to be consulted, it seems to be of little moment whether he who maintains the suit of another receives his reward from the subject of the suit, or from any other property of the suitor. Champerty is one species of maintenance; but the authorities do not declare contracts for a part of the thing in demand universally unlawful. The distinction made by the books between interference which is legal and that which is unlawful, consists in the rule and the exceptions stated; and where maintenance is lawful, as in the case of interest in the subject, or relation to the suitor, in contract to divide the subject of the suit, which is maintenance in a particular form, is also lawful."

Holding the purchase and sale to have been lawful, it but remains to be considered whether the liability of Fowler for costs as a party to the amended and supplemental bill, predicated upon his purchase, and his subsequently becoming a party to the suit, rendered him obnoxious to the objection of unlawful maintenance. We have seen that he might lawfully maintain the suit of his clients with his professional services; but, according to the common law rule, he could not go beyond this and support his clients' cause, at his own proper costs. "In the payment of the costs, or by agreeing to pay them, he acts out of his character as a professional man, and maintains the suit in a way which that character does not justify. But so long

as his contract stipulates only for such services as he may lawfully render without being guilty of maintenance, it is not vitiated on any ground of champerty, because those services are to be requited out of the thing in suit, which by our law is a proper subject of contract. *McLane* v. *Bayard*, 3 Harr. 212. Clearly, as to this point, Fowler is to be considered as incurring costs, not for his clients, but on account of his legal interest, and for himself. If he could not go to law, and incur costs in respect to his purchase, it would be nugatory, as we have already said. The subject of his purchase having been held adversely, the law authorizing the purchase and sale, must have contemplated that the purchaser would go to law to recover it.

We conclude, then, upon the objection of champerty, that it cannot be sustained, and affords no answer to the relief sought by the complainants.

In passing upon the objection for champerty, we have also, in effect, passed upon the other objection, that the sale and conveyance were made *pendente lite;* because the doctrine, that a sale and conveyance of land made *pendente lite* are void, was founded exclusively upon the several acts of parliament against maintenance and champerty.

Superior Court of Suffolk County, Massachusetts.

September Term, 1857.

NATH'L C. NASH ET AL. *v.* JAMES SMITH, TRUSTEE.

A creditor gave his debtor a license for six months, and covenanted that if he "sued, arrested, attached, or prosecuted" the debtor within that time, the debtor should be released and discharged from his claim. Two days before signing this agreement, the creditor had commenced an action against the debtor, which was entered in court within said six months, and continued there for several terms. *Held*, that the entry of this action operated as a discharge of the claim.

ABBOTT, J. — This is an action of contract to recover the sum of $650 for goods sold and delivered by the plaintiffs to the defendant. The parties have agreed to a statement of facts, by which it appears that on the 21st day of

April, 1856, the demand which is sued for in this action, being then due and payable, the plaintiffs sued out their writ against the defendant to recover the same, and summoned the same trustee named in this action, who, at that time, owed the defendant a considerable sum of money liable to attachment. On the 23d day of the same April, the plaintiffs, with other creditors of the defendant, entered into an arrangement with him, by which they covenanted to give him "full license and liberty to go about his affairs," without any "let, suit, trouble, arrest, attachment, or any other impediment to be offered, or done unto him, his wares, goods, moneys, or other effects," from either of the creditors who were parties to the agreement, or their heirs or assigns, for the term of six months for one third of his debts, nine months for another third, and twelve months for the remainder. The said creditors also covenanted with the defendant by the same instrument, that for six months they should and would not "sue, arrest, attach, or prosecute the said defendant for or on account of their several debts," and that if any "hurt, wrong, trouble, damage, or hindrance, be done" to said defendant either "in body, goods, or chattels within said six months" by said creditors, or any of them, or by their procurement, or consent, contrary to the "true intent and meaning of the agreement," then that the defendant by virtue thereof should be forever discharged and acquitted as against the creditors by whose means or procurement he should be "arrested, attached, imprisoned, grieved, or damaged," from all demands due said creditors. The action commenced by the plaintiffs two days before signing and sealing this agreement, was regularly entered by them at the next May term of this court, and continued from term to term till February 4th, 1857, when they became nonsuit, and paid the defendants his taxable costs for which he had judgment. On the same day, this action was commenced, the same trustee summoned, the money in his hands attached in the first suit, being also attached in this. At some time after the first suit was entered, the plaintiffs offered to enter "Neither Party" therein, which proposition the defendant refused to assent to. Upon this state of facts, the defendant contends that he is forever discharged and released from the demand here sued for, while the plaintiffs claim that before the defendant is entitled to such a discharge, he must at least show some special dam-

age from the promotion of the first suit, and the sequestration of his money in the hands of the trustee for more than nine months.

Although it is perfectly clear, both upon authority and principle, that a covenant never to sue a debt may be availed of as a release in full defence, to avoid circuity of action, it is equally clear and well settled, that a covenant not to sue for a limited time cannot be plead in defence to a suit within that time, but that it must be treated as an independent agreement, to be enforced by action, in which full damages will be recovered for a breach. Did this case only disclose a covenant not to sue for the times specified in the agreement, there clearly would be nothing to prevent the plaintiffs from recovering in this action, whatever might be the rights and liabilities of the several parties in an action for breach of covenant. But there is another element in the case which entirely changes the aspect of it. The plaintiffs, in addition, have agreed if they should cause any "hurt, trouble, wrong, damage, or hindrance," to be done to the defendant, either "in body, goods, or chattels, contrary to the true intent and meaning" of their agreement, then that he should be forever acquitted and discharged from their claims. It has always been holden that where the creditor added such an agreement to his covenant not to sue for a limited time, that it might be availed of by the debtor in full defence to any action commenced within the specified time. *White* v. *Dingley*, 4 Mass. R. 433; *Perkins* v. *Gilman*, 8 Pick. R. 230. The reason given for the rule by our courts is, that where the debt is to be discharged, if sued within the limited time, such an agreement is to be taken as a stipulation of forfeiture of the whole demand, with liquidated damages commensurate to the amount of the debt sued, and so may be plead in bar of an action within the limited time. We apprehend it would be more correct, and certainly a more satisfactory reason, to hold in such case, that there was a contingent and conditional discharge and release of the defendant dependent for its taking effect on the happening of a condition subsequent, and that when the event happened, and the contingency ceased, the discharge became absolute. But whatever may be the true and proper reason for the rule, the rule itself is the law, by which this case and others like it must be governed. The only question, then, to be settled is this, Do the agreed facts disclose any acts

of the plaintiffs by the doing of which the defendant's discharge was to become absolute? We think very clearly they do.

In passing on this question, the situation of the parties to the agreement, and their relation to each other, must be taken into consideration. The defendant was not able to pay his debts in full; the plaintiffs and his other creditors, to enable him to discharge his indebtment to them, agreed to give him time, and permit him, during that time, to have the full and entire control both of his liberty and property. It is quite apparent that the true intent and meaning of the agreement would be violated by one of the creditors who had signed it, sequestrating by the prosecution of a suit against the defendant, a portion of the very property he was to be permitted to deal as he pleased with, during the whole time he was to be exempt from suit and arrest; thus keeping from him a portion of the means he was to use to enable him to meet his debts at the end of the limited time. But superadded to the argument to be drawn from the situation of the parties, their relations to each other, and the clear and apparent intent and object of the arrangement in question, we have the express covenant of the plaintiffs that they will not "arrest, sue, attach, or *prosecute*" the defendant on their demand against him during the time limited. This covenant is very clearly broken, if the agreed facts are true. If entering a suit in court, already commenced at the time of making that covenant, and continuing it there through four terms, and into the fifth, thereby, during the whole time, depriving the defendant of this property attached in the trustees hands, and putting him to the cost of appearing and defending is not "prosecuting" upon the plaintiffs' demand, it is pretty difficult to conceive of any facts which would satisfy the requirements of that expression. Following upon this covenant we have the provision for a discharge and release of the demand of the creditor through whose means or procurement "any hurt, wrong, damage, trouble, or hindrance," either "in body, goods, or chattels," should be done to the defendant, during the time limited, "contrary to the true intent and meaning" of the agreement. We then have the facts agreed, that although the plaintiffs commenced no new suit after this time, they promoted and prosecuted one just before commenced, entering and keeping it in court, for more than nine months, thereby taking

from the defendant during that time the use and control of a part of his means, and compelling him to incur the cost and expenses of defending himself from a suit wrongfully prosecuted. We think it unnecessary to show any other, or further, or more special damage. Here are facts disclosed which must work the evil intended to be guarded against. If but one of the terms had been used, instead of the whole five, the result would have been the same. It would be a wilful perversion of the meaning of language, to hold that such conduct as that disclosed on the part of the plaintiffs, was not doing either the "hurt, wrong, damage, trouble, or hindrance" provided against. The prosecution of the suit, under the circumstances, was not only a "hurt, damage, trouble, and hindrance" to the defendant, but it was a "wrong" on the part of the plaintiffs; it was doing what they had covenanted not to do; an act in direct violation of the "true intent and meaning" of their agreement. Nor does it alter the case, that the plaintiffs at one time offered to enter "Neither Party" in the first suit, and subsequently became nonsuit therein, and paid the costs. The discharge and release became absolute before such offer and payment, by voluntarily entering the action in court, and thus withholding from the defendant the control of a part of his property. Besides, that suit was prosecuted wrongfully, and in direct violation of the plaintiffs' covenant, they could therefore by no means insist on the defendant's giving up his costs. By becoming nonsuit, they only put an end to a suit they never should have prosecuted after signing the agreement in question. We are of opinion that the contingency upon which depended the defendant's release from the demand sued for having ceased, that the discharge from the plaintiffs became absolute by its own provisions, and therefore judgment must be entered up for the defendant.

Notices of New Publications.

A Practical Treatise upon the Law of Railways. By Isaac F. Redfield, LL. D., Chief Justice of Vermont. Boston: Little, Brown, & Co. 1858.

To many of the profession the time has been, since they began practice, that a book with such a title, would have been a matter of new and curious speculation. Long since we were privileged to carry a green bag, we were present at the making of the first report to our legislature upon the feasibility of a railroad from Boston to Connecticut River, in which such a scheme was favored and advocated. And nothing could exceed the ridicule with which its feasibility was received by many in the house. It was a new and untried project, and, as is stated in the work before us, the trial test of the two first locomotive engines upon the Liverpool and Manchester Railroad, was made as late as October, 1829. Since that time, they have multiplied in almost every country, till they have become the great arteries of business and locomotion, not only between marts of trade and commerce in the same State, but between points of great remoteness across intervening States, and through independent jurisdictions. The land is becoming almost as free a highway for commerce, as the ocean itself has hitherto been.

As a consequence of this new mode of transporting goods and passengers, the rights and liabilities of the companies by whom these roads have been constructed, their powers over private property, and the relations between them and the public and their own stockholders, have given rise to numerous questions of great magnitude and importance, which were novel in their character and often difficult of solution. As a single illustration of this, we would refer to the fact, that in the first three volumes of the United States Digest, bringing down the decided cases to near 1847, there are only two cases to be found under the head of "Rail-Road." The two next volumes contain only about fifty of these cases, although the whole number of volumes whose cases are digested in these five exceed six hundred and fifty. In contrast with these, so rapidly had they multiplied, the volume for the single year 1855, containing the cases in forty-eight volumes of Reports, embraces as many under the head of "Rail-Road," within some two or three, as are found in the digests of the whole six hundred and fifty volumes just mentioned.

No better or more striking illustration of the flexibility and power of expansion and adaptation of the common law to new circumstances can be offered, than the readiness and ease with which it supplies the rules and elements of jurisprudence by which the multifarious interests and relations upon the subject of railways are regulated. And what, moreover, ought to increase our confidence in and respect for the common law, is the general uniformity which prevails in the decision of these questions as they have arisen, from time to time, in the courts of some thirty different and independent States, as well as where these are compared with the decisions of the English courts. If in a few instances these have been found to differ upon some of the matters submitted to them, it is no more than we witness in solving questions in the higher departments of morals,

where acute and honest minds have been guided by the general light of revelation, as well as of refined reason.

Questions enough have arisen and principles enough been evolved in respect to the rules which regulate the use of railroads, and the duties and responsibilities of those who own and manage them, to constitute, when collected, a very considerable body of law. A small part of this only can be found in the statutes which have been enacted upon the subject. It is chiefly drawn from the already familiar principles of the common law. So numerous, moreover, are the persons and classes who are affected by the operation of these roads, that it had become a great desideratum that the laws which regulate them should be made accessible to all.

When it was announced, therefore, a few months since, that a work upon this subject was in progress, from the pen of Chief Justice Redfield, many congratulated themselves that this desideratum was about to be supplied. His long experience as a judge, his learning, acuteness of mind, ready powers of analysis, and his habits of thorough, diligent, and elaborate research, seemed to mark him out as one peculiarly fitted for the undertaking. Few men have achieved a higher reputation in our country as a jurist than Judge Redfield. He has been upon the bench of the supreme court of Vermont for twenty-two years, and during more than five of them its chief justice. During this period the decisions of that court have become known and respected in the courts of all the other States. The pages of the Law Reporter, as its readers are aware, have often been enriched by the clear, well considered, and well reasoned opinions of its chief justice, as well as by special contributions from his pen. And when it is remembered that he has held this place for this length of time, by annual elections, although of a different political creed from the majorities of the legislatures that have elected him, it is a pleasant testimony to the confidence which he has won among those for whom he has so long labored.

But to the work before us. We have here a volume of some seven hundred pages, which, independent of the character of its contents, does credit to the publishers by the manner of its execution. A glance at its contents will show the order of arrangement, and minuteness of analysis, which mark the work. Upon a topic so new, the author had few works upon the subject to guide him in the order and arrangement of its parts. For Mr. Pierce's useful and carefully prepared treatise has appeared too recently to afford more than an occasional hint or citation in support or illustration of topics already almost matured.

The reader will have no occasion to excuse a hasty compilation, whatever may be the judgment he may otherwise form of the work. And when it is remembered from how many sources and related topics, the law of railways must be drawn, the extent of labor in accomplishing the present work may be imagined. The author has been obliged to examine and apply the laws of corporations; the right of eminent domain over private property, and public easements and franchises; the construction of charters; the duties and liabilities of carriers of goods and of passengers; the duties and liabilities of agents; the power of courts over corporations by mandamus, injunction, and the like, as being among the elements from which courts have derived the system of law which they have adopted in determining the several rights and duties growing out of chartering, constructing, and operating railroads. And the extent of the range over which he has had occasion to glean his materials, and the diligence with which he has labored to gather them, may be judged of by the fact, that we find over three thousand cases cited and referred to in this volume, many of which he has digested

in full, and many more has critically and carefully examined and analyzed.

Two great classes are immediately interested in the law regulating the management of railroads,— the stockholders for their profits, and those who use them for passage or freight, for their convenience. And these are, in a manner, antagonist to each other. Hitherto, the latter have been altogether the most fortunate and most favored of the two. While the statistics of loss on the part of stockholders have been frightful, in the amount of the capital of the country swallowed up in these enterprises, it is difficult to approximate even, the gain and advantage they have brought to men of business and holders of fixed property, in the enhanced value of the latter, and the facilities afforded for the constantly widening operations of the former. This they have done not only by the cheapness and quickness of transit both of person and goods, but from the fact that railroad companies, being held to the stringent rules of common carriers, are the insurers of the safety of everything intrusted to their care. Both these general subjects are treated of, in detail, in the work before us. One hundred and twenty-four pages are devoted to railways as common carriers; and forty to railway investments and dividends.

In most particulars we find all common law courts, here and abroad, uniting with entire harmony in transferring the liabilities of common carriers to the managers of railroads. While goods are in actual transit, we are not aware that courts differ at all as to the company's liability. Nor does there seem to be any considerable discrepancy upon the point when this liability begins, though the question has at times given rise to discussion. But, in respect to when the liability of a railroad as a carrier ends, there have been conflicting decisions between courts of eminent ability in different States.

The question arose in this manner. It is known that railroad companies have warehouses in which goods for transit, or which have been transported, are deposited for safe-keeping. It is obvious, too, that like goods water borne, those transported by a railroad cannot be delivered off the line of the transit from its trains. The point of difference between these courts has been whether the liability of the road, as carrier, terminates immediately upon the discharging the goods at the station in the usual place, where they are to be received, so that they are ready to be taken by the consignee, before notice is given to the consignee of their arrival; or whether it continues for a period afterwards, sufficient for the consignee, by the use of diligence, to remove them.

In some States this is regulated by statute; but in most, it is left as a question at common law. The questions have arisen in cases where the goods have been discharged and deposited in the company's warehouse, and in that condition destroyed by fire. In New Hampshire it has been held, that if this took place before the consignee had a reasonable opportunity, during the hours when such goods are usually delivered there, of examining them, the company were liable as carriers. *Moses* v. *B. & M. R.* 32 N. H. 523. In Massachusetts it has been held, that this liability ceases immediately upon the termination of the transit by a discharge of the goods into the usual place of deposit, and the only liability of the company afterwards is that of a warehouse-man. *Norway Plains Co.* v. *B. & M. R.* 1 Gray, 263. The opinion in the latter case was given by Chief Justice Shaw, and, although the author of this book clearly inclines to the doctrine of the courts of N. Hampshire, he pays a just and well merited tribute to the author of that opinion, — "who has no superior upon this Continent, as a wise and just expositor of the law, as a living and advancing study."

As both these actions were against the same corporation, under substantially the same circumstances, it presents a singular instance of conflict of laws, — the tribunals of our State at one end of the road holding it liable, and those of another at the other end, discharged from this liability. Similar conflicts may hereafter arise where, as is now so commonly the case, goods are forwarded over successive lines of road through several intervening States, under an arrangement by which a joint and common liability is assumed for the entire transit.

The Massachusetts rule is certainly much more simple and readily applied than that which requires the whole circumstances of each particular case to be inquired into, in order to determine whether the loss took place before the consignee had a reasonable opportunity to take the goods into his possession or not. Besides, if it were a doubtful point of law, and any light might be thrown upon it by any course of *à priori* reasoning, it might be said that it would be more reasonable to apply the general rules of bailment to goods thus situated, than the severe and jealous stringency with which common carriers were regarded in a barbarous state of society in the infancy of the law.

In speaking of "Railway Investments," the author indulges in some very pertinent and timely remarks, partaking quite as much of the rules of sound common sense as settled common law. He speaks of the expedient, so frequently resorted to, for completing works begun without adequate means to finish, by creating new shares at rates often half or third of the par value of the original shares, and thus, of course, reducing, at a blow, the par value of the entire stock. The share for which an hundred dollars has been paid, representing, afterwards, but fifty in the market. "Such practices," he remarks, "cannot fail to strike all minds alike, as desperate financial expedients, and more or less fraudulent in their operation upon the market value of stock sold at a higher price." "This is not the place, nor are we disposed to read a homily upon the wisdom of legislative grants or the moralities of moneyed speculations in stocks on the Exchange or elsewhere. But it would seem, that legislation upon this subject should be conducted with sufficient deliberation and firmness, so as not to invest such incorporations with such unlimited powers, as to operate as a net to take the unwary, or a gulf in which to bury out of sight the most disastrous results to private fortunes, which has justly rendered American investments taken, as a whole, a reproach wherever the name has travelled."

This is certainly plain language, and conveys manly sentiments, which neither moralist nor lawyer should hesitate to avow in view of the sad fate of the thousands who have been lured on from time to time, to intrust their all to the management of railroad officers and agents in our country, and found themselves the victims of rashness, folly or crime. Our author comments upon the case against the N. Y. and N. H. R. R., reported in 4 Duer, 480, and approves of the latter decision, which denies the liability of the company to the holder of such spurious stock. Nor is it easy to see how a different conclusion could have been arrived at, when it is considered that the corporation is a creature of very limited delegated powers; that it could not itself create shares beyond a definite number; and by creating these it exhausted its authority to act, and that it could not delegate any greater power to another than it had itself. "And it is by no means certain," the author remarks, "that it is not equally in accordance with the soundest principles of equity and moral justice. For, whatever may be said of the duty of corporations to employ only reliable directors and transfer agents, and of the justice of the company being bound by their acts within the apparent scope of their employ-

ment, — all of which are, in general terms, most undeniable propositions, — still, something is due to common prudence and reasonable caution, on the part of those who deal in stocks, to see at least what the charter and books of the corporation will at once exhibit to any one who will examine."

But this notice of the work before us has already exceeded the limits originally intended, and must be brought to a close. Some of the topics of which it treats, such as the sale by a railroad of its franchise and other property, have been the topics of discussion in the Law Reporter, especially in the able prize essay of Mr. Martin of the Law School of Harvard College, published in the last October and November numbers of the work. But the subjects which it embraces are too numerous and important to undertake to examine or discuss them here.

The book, from the known character of the author, as well as from the several sections and chapters that we have been able to read, is one which we feel confidence in commending to the favor of the profession and the business community at large. Nor can we doubt that the delicate self-distrust expressed by the author, "if the work should be found of sufficient importance to require another edition," will soon be removed by the ready demand which there will be for so timely and so reliable a treatise upon so interesting a subject.

REPORTS OF SOME OF THE JUDGMENTS AND DECISIONS OF THE COURTS OF RECORD OF THE HAWAIIAN ISLANDS, for the two years ending with 1856. By GEORGE M. ROBERTSON. Honolulu: Printed at the Government Press. 1857.

No where have the beneficial effects of missionary labor been more clearly shown or more fully exemplified than in the great results achieved in the Hawaiian Islands. Christianity has been introduced; a constitutional and representative government formed; judicial tribunals established; learned and able judges appointed, and the means of education extended to the people.

The first volume of the reported decisions of a court is read with interest and examined with care. The judicial power elsewhere parcelled out among diverse and conflicting jurisdictions is here concentrated in one tribunal. One and the same court, sitting in Equity, enjoins the fraudulent, compels the performance of trusts, or relieves against accident; as a court of Common law with its different forms of actions and its niceties of pleading, it gives damages for the non-performance of contracts, and the tortious acts of wrong-doers; in Admiralty, it embraces the whole range of maritime jurisdiction, seizing the ship and holding it for the protection of the sailor, the laborer, and the material man; while as a Court of probate it controls the distribution of estates, and secures the rights of the widow and the orphan. Hence an unusual variety of questions have been presented for adjudication.

It seems that the jury is not required to be unanimous, for in Woods *v.* Hooper, 17, and in King *v.* Coady, 71 one, and in Kahanu *v.* Thompson, 235, three jurymen dissented from the verdict which their fellows rendered. In the Hawaiian Islands, as elsewhere, the jury sometimes take the law in their own hands, and decide contrary to the instructions of the court; but when this is the case the court, as in Lewis *v.* Davis, 141, will set it aside and grant a new trial. From the case of Hookii *v.* Nicholson,

260, it appears that the sewing machine, that great invention of civilized ingenuity, has not only been introduced, but has become the subject-matter of litigation. In La Motte *v.* Angel, 136, the right of the consignee to off-set the damages arising from the negligence of the carrier against the claim for freight, was very fully and elaborately discussed and allowed against the English, but in accordance with the weight of American authority.

Were it not for the names of parties and an occasional reference to legislation specially applicable to the natives, one might well imagine that he was reading the reports of any of our States, such is the general similarity in the several matters of legislation. Indeed the general principles of law, as administered in England and this country, seem to have been adopted and naturalized as a portion of their law.

The first chief-justice of the court was the Hon. Wm. L. Lee, a citizen of New York, who after completing his professional education under Judge Story in the Law School at Cambridge, visited the Islands for his health, and while there was induced to remain and enter into the service of the government. The present volume is prepared by Mr. Justice Robertson, one of the associate justices of the court, and embraces its most important decisions during a period of ten years. It is dedicated to the memory of the late chief-justice, and will be an enduring monument of his learning and ability.

The present chief-justice is the Hon. Elisha H. Allen, a native of Massachusetts, and formerly member of Congress from Maine. Upon the election of President Taylor he was appointed consul at Honolulu, and after the expiration of his consular term, at the instance of the Hawaiian government, he accepted the post of minister of finance. He was afterwards sent ambassador to the United States, and on his return from his mission was appointed chief-justice, to the duties of which office he brings rare ability as a presiding officer, courteous manners, quickness of perception, and sound professional learning.

The volume affords ample proof of the learning and industry of the court, and leaves no reason to doubt that the people of these distant isles enjoy the security, which a firm and able administration of the law can alone give. Its literary execution is highly creditable. The abstracts of the points decided are perspicuous and complete, and the opinions of the court rest upon a careful and well considered examination of the different authorities bearing upon the questions presented for decision.

Perhaps the most marked difference between the courts there and in this country, consists in their greater liberality of compensation, in which we might do well to imitate them. The chief-justice receives five thousand dollars *per annum*, and all their salaries are in marked contrast with the niggardly pay in most instances with us.

To Contributors. — Much valuable matter has been crowded out of this Number. We shall publish it in our next.

Insolvents in Massachusetts.

Name of Insolvent.	Residence.	Commencement of Proceedings.	Name of Judge.
Abbott, Joel A.	North Reading,	Nov. 5,	L. J. Fletcher.
Bemis, John (*a*)	Barre,	" 30,	Alexander H. Bullock.
Boulter, Royal (*b*)	Boston,	" 11,	Isaac Ames
Bowers, Charles R.	Somerville,	" 10,	L. J. Fletcher.
Boyd, John M.	Marlboro',	" 7,	L. J. Fletcher.
Boynton, Joseph B.	Petersham,	" 7,	Alexander H. Bullock.
Burnham, George H.	Lawrence,	" 24,	Henry B. Fernald.
Caldwell, George A.	Medford,	" 2,	L. J. Fletcher.
Carleton, Hiram	Roxbury,	" 28,	Isaac Ames.
Chadwick, Zenas F.	New Bedford,	" 28,	Joshua C. Stone.
Chamberlin, Charles P. (*c*)	Boston,	" 6,	Isaac Ames.
Clapp, Smith W. (*d*)	Holyoke,	" 21,	J. M. Stebbins.
Clark, D. M	Spencer,	" 25,	Alexander H. Bullock.
Clifford, Dan. A.	Salem,	" 13,	Henry B. Fernald.
Conant, Elisha P.	Lexington,	" 19,	L. J. Fletcher.
Cotton, Lewis	Boston,	" 2,	Isaac Ames.
Cowdry, Isaac	Melrose,	" 24,	L. J. Fletcher.
Davis, Joseph	Acton,	" 5,	L. J. Fletcher.
Decoene, Ferdinand	Roxbury,	" 13,	Francis Hilliard.
Dempsey, Peter J.	Boston,	" 6,	Isaac Ames.
Dewson, Wm. R. (*e*)	Boston,	" 28,	Isaac Ames.
Dudley, George P.	(Not stated.)	" 24,	Isaac Ames
Dyer, Nathl. N.	Abington,	" 3,	David Perkins.
Estabrook, James A.	West Cambridge,	" 19,	Isaac Ames.
Eaton, Henry P.	Greenfield,	" 16,	Horace I. Hodges.
Eaton, Henry P. (*f*)	Newton	" 19,	L. J. Fletcher.
Fales, David N.	Wrentham,	" 10,	Francis Hilliard.
Farless, James A. (*g*)	Salem,	" 24,	Henry B. Fernald.
Flagg, Eben'r (*h*)	(Not stated.)	" 23,	Alexander H. Bullock.
Foster, Thomas P. (*c*)	Boston,	" 6,	Isaac Ames
Frost, Oliver (*h*)	Boston,	" 11,	Isaac Ames.
Gee, Hollis F.	Wrentham,	" 10,	Francis Hilliard.
Graves, Enos D.	Leverett,	" 16,	Horace I. Hodges.
Gregory, Saml. B. (*i*)	Marblehead,	" 4,	Henry B. Fernald.
Harrington, C. J. (*j*)	Millbury,	" 16,	Alexander H. Bullock.
Harrington, Leonard } (*h*) Harrington, S. P. }	(Not stated.)	" 23,	Alexander H. Bullock.
Harrington, Wm. H. (*j*)	Millbury,	" 16,	Alexander H. Bullock.
Hawes, Wm.	Holliston,	" 25,	L. J. Fletcher.
Heald, Jonas, Jr. (*j*)	Millbury,	" 16,	Alexander H. Bullock.
Holmes, George (*k*)	Worcester,	" 5,	Alexander H. Bullock.
Hoogs, Geo W., Jr.	Needham,	" 12,	Francis Hilliard.
Houghton, Richard	Boston,	" 6,	Isaac Ames.
Howard, Saml. W. S.	North Bridgewater,	" 25,	David Perkins.
Howe, Charles M.	Marlboro',	" 5,	L. J. Fletcher.
Hubbard, Edmund, Jr. (*d*)	Holyoke,	" 21,	John M. Stebbins.
Jeffers, Wm.	Haverhill,	" 13,	Henry B. Fernald.
Jenness, Woodbury L.	Lowell,	Oct. 8,	L. J. Fletcher.
Kingsbury, Eben'r L.	Franklin,	Nov. 9,	Francis Hilliard.
Little, Geo. P.	Boston,	" 10,	Isaac Ames.
Lowell, R. Mowe (*l*)	Boston,	" 10,	Isaac Ames.
Lucas, Benjamin	Boston,	" 18,	Isaac Ames.
Mahoney, Jeremiah	Salem,	" 11,	Henry B. Fernald.
Mason, Wm. (*m*)	Taunton,	" 17,	Joshua C. Stone.
Merrill, L. D. (*c*)	Boston,	" 28,	Isaac Ames.
Moulton, Rufus (*f*)	Newton,	" 19,	L. J. Fletcher.
Mullin, John R. (*n*)	Boston,	" 25,	Isaac Ames.
Nash, Wm. G.	Weymouth,	" 2,	Francis Hilliard.
Newcomb, Caleb (*g*)	Salem,	" 24,	Henry B. Fernald.
Newhall, Alfred (*n*)	Boston,	" 25,	Isaac Ames.
Norris, Charles H.	Salem,	" 10,	Henry B. Fernald.
Northampton Woollen Manufacturing Co.		" 3,	Horace I. Hodges.
Orr, George S.	Fall River,	" 28,	Joshua C. Stone.
Osgood, John H.	Sudbury,	" 27,	L. J. Fletcher.
Owen, Nathl., Jr. (*o*)	Waltham,	" 20,	L. J. Fletcher.
Paine, David	Natick,	" 12,	Isaac Ames.
Pearce, Robert	West Roxbury,	" 20,	Isaac Ames.
Pritchard, Ezra (*i*)	Marblehead,	" 4,	Henry B. Fernald.

Name of Insolvent.	Residence.	Commencement of Proceedings.	Name of Judge.
Putnam, Wm. H.	Malden,	Nov. 21,	L. J. Fletcher.
Quinnell, Isaac, Jr.	New Bedford,	" 28,	Joshua C. Stone.
Read, Nelson S. (*n*)	Boston,	" 25,	Isaac Ames.
Ricker, Jeredian } (*p*) Ricker, Moses }	Cambridge,	" 26,	L. J. Fletcher.
Riddle, Edward	Charlestown,	" 19,	Isaac Ames.
Robinson, Wm., Jr. (*a*)	Barre,	" 30,	Alexander H. Bullock.
Roxbury Color and Chemical Manufactory		" 20,	Francis Hilliard.
Sargeant & Foster (*q*)	Shelburne,	" 2,	Horace I. Hodges.
Sears, Willard	Watertown,	" 2,	L. J. Fletcher.
Skinner, Alfred H.	Charlestown,	" 7,	L. J. Fletcher.
Slade, Robert (*r*)	Dorchester,	" 14,	Isaac Ames.
Smith, Thomas F. (*k*)	Worcester,	" 5,	Alexander H. Bullock.
Snow, Sarah T.	Danvers,	" 25,	Henry B. Fernald.
Somerville Dyi'g and Bleaching Company		" 25,	L. J. Fletcher.
Stowe, Francis	Marlboro',	" 14,	L. J. Fletcher.
Stratton, Daniel C. } (*o*) Stratton, Thomas S. }	Waltham,	" 20,	L. J. Fletcher.
Trull, Herbert	Tewksbury,	" 12,	L. J. Fletcher.
Turner, Alfred R.	Malden,	" 7,	L. J. Fletcher.
Twining, Eleazar	Tolland,	" 18,	John M. Stebbins.
Webb, John C.	Manchester,	" 4,	Henry B. Fernald.
Webster, Fletcher	Marshfield,	" 18,	David Perkins.
White, Carlos C. (*l*)	Springfield,	" 10,	Isaac Ames.
White, Frederick A. (*l*)	Boston,	" 10,	Isaac Ames.
Whitney, Joel	Winchester,	" 13,	L. J Fletcher.
Whiton, Henry (*r*)	Boston,	" 14,	Isaac Ames.
Whittemore, Henry S. (*h*)	(Not stated.)	" 23,	Alexander H. Bullock.
Whitten, Wm. T.	Lowell,	" 16,	L. J. Fletcher.
Whittenton Mills (*m*)	Taunton,	" 17,	Joshua C. Stone.
Wilkins, Ira D.	Boston,	" 12,	Isaac Ames.
Wilson, Wm. W.	Newburyport,	" 12,	Henry B. Fernald.

(*a*) Bemis & Robinson.
(*b*) Frost & Boulter.
(*c*) Chamberlin & Foster.
(*d*) Clapp & Hubbard.
(*e*) L. D. Merrill & Co.
(*f*) Eaton & Moulton.
(*g*) Newcomb, Farless & Ce.
(*h*) Whittemore, Harrington & Co.
(*i*) Firm not stated (Gregory & Pritchard.)
(*j*) Harrington, Heald & Co.
(*k*) T. F. Smith & Co.
(*l*) White, Lowell & Co.
(*m*) Wm. Mason & Co.
(*n*) Alfred Newhall & Co.
(*o*) D. C. Stratton & Co.
(*p*) M. & J. Ricker.
(*q*) Sargeant & Foster. (Individual names not given.)
(*r*) Slade & Whiton.

The name of Henry P. Eaton, which occurs twice in the foregoing list, represents two distinct cases.